TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 735.

CLEVE W. VAN DYKE, PLAINTIFF IN ERROR,

vs.

CORTOVA COPPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

FILED OCTOBER 9, 1912.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 25, 1914.

a In the Supreme Court of the State of Arizona.

No. 1279.

CLEVE W. VAN DYKE, Appellant,
vs.
CORDOVA COPPER COMPANY, a Corporation, Appellee.

Mr. F. C. Jacobs, and Mr. Richard E. Sloan, Mr. William M. Seabury, and Mr. James Westervelt, (of the law firm of Sloan, Seabury and Westervelt), attorneys for Appellant.
Mr. John H. Campbell, attorney for Appellee.

On Appeal from the Superior Court of the State of Arizona, in and for Gila County.

Be it remembered that on to-wit: the sixteenth day of September, 1912, came the appellant in the above entitled cause, by his attorneys and filed in the office of the clerk of the Supreme Court of the State of Arizona in above entitled cause, a certain Judgment Roll, in words and figures following, to-wit:

1 In the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila.

CORDOVA COPPER COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Complaint.

Now comes the Cordova Copper Company, plaintiff, and complains of Cleve W. Van Dyke, defendant, and alleges:

I.

For a first cause of action:

1. That the plaintiff is a corporation organized under the laws of the Territory of Arizona, having its principal place of business in the County of Cochise in said territory; that the defendant is a resident of the County of Gila in said Territory.

2. That on or about the 25th day of January, 1909, for some time prior thereto, ever since then and now, Live Oak Development Company has been and is a corporation duly organized under the laws of the Territory of Arizona; that on said date the said Live Oak Development Company, at the instance and request of said defendant, advanced and loaned to him the sum of two thousand
2 dollars ($2,000.00), which said defendant then and there promised and agreed to repay to said Live Oak Development

Company on or before May 15th, 1909, with interest at the rate of six per cent per annum.

3. That thereafter, and on or about the 8th day of March, 1909, the said Live Oak Development Company, for value received, duly assigned, transferred and set over to the plaintiff herein the aforesaid indebtedness from the defendant to said Live Oak Development Company, and all its rights, title and interest in and to the same, and the cause of action created thereby; and that by reason thereof the plaintiff then became, even since has been and now is the owner of said claim and indebtedness against said defendant, and that no part of the same has ever been paid (except as hereinafter stated), although payment thereof has been duly demanded and the same is long past due.

II.

For a second cause of action:

1. That the plaintiff is a corporation organized under the laws of the Territory of Arizona, having its principal place of business in the County of Cochise, in said Territory; and that said defendant is a resident of the County of Gila, Territory of Arizona, aforesaid.

2. That on or about the 8th day of March, 1909, this plaintiff, at the special instance and request of the defendant, loaned and
3 advanced to said defendant the sum of five thousand dollars ($5,000) in lawful money of the United States, which said defendant then and there promised and agreed to repay to the plaintiff on or before May 15th, 1909, with interest from February 20th, 1909, at the rate of six per cent per annum. That the defendant has not paid the said sum of five thousand dollars ($5,000.00), nor the interest thereon, nor any part thereof (except as hereinafter stated), although payment thereof has been duly demanded and the same is long past due.

III.

For a third cause of action:

1. That the plaintiff is a corporation organized under the laws of the Territory of Arizona, having its principal place of business in the County of Cochise, in said Territory; and that said defendant is a resident of the County of Gila, Territory of Arizona, aforesaid.

2. That on the 14th day of July, 1909, this plaintiff, at the special instance and request of the defendant, loaned and advanced to said defendant the sum of ten thousand and ten dollars ($10,010.00), in lawful money of the United States, which said defendant then and there promised and agreed to repay to the plaintiff on demand, with interest. That the defendant has not paid the said sum of ten thousand and ten dollars ($10,010.00), nor the interest
4 thereon, nor any part thereof (except as hereinafter stated), although payment thereof has been duly demanded and the same is long past due.

IV.

That on the 24th day of March, 1910, the defendant paid to plaintiff the sum of twenty-five hundred, fifteen and 66/100 dollars

($2,515.66), upon the indebtedness set out in the three causes of action aforesaid, whereby there became due and was due to plaintiff from defendant on said day a balance upon the three said causes of action in the sum of fifteen thousand three hundred and sixty-four and 75/100 dollars ($15,364.75) with interest thereon from said date at the rate of six per cent per annum, no part of which has been paid though often demanded.

Wherefore, plaintiff prays judgment against the defendant for the sum of fifteen thousand three hundred and sixty-four and 75/100 dollars ($15,364.75), with interest thereon from the 24th day of March, 1910, at the rate of six per cent per annum, and for its costs in this action.

FREDERICK S. NAVE,
Attorney for Plaintiff.

Filed Dec. 2, 1911.

5 In the District Court of the Fifth Judicial District of The Territory of Arizona, in and for the County of Gila.

CORDOVA COPPER COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Action Brought in the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, and the Complaint Filed in said County of Gila, in the Office of the Clerk of said District Court.

The Territory of Arizona sends greeting to Cleve W. Van Dyke, Defendant:

You are hereby summoned and required to appear in an action brought against you by the above named plaintiff, in the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, and answer the complaint filed with the Clerk of this Court at Globe, in said county, (a copy of which complaint accompanies this Summons), within twenty days, (exclusive of the day of service) after the service upon you of this Summons—if served in this county, in all other cases thirty days—or judgment by default will be taken against you according to the prayer of said complaint.

And you are hereby notified, that if you fail to appear and answer the said complaint, as above required, the said Plaintiff will apply to the Court for the relief therein demanded, and for costs and disbursements in this behalf expended.

6 Given under my hand and the seal of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, this 2nd day of December, A. D. 1911.

[SEAL.] GEORGE H. SMALLEY, *Clerk.*
By ELSIE PATTON, *Deputy.*

Office of the Sheriff of the County of Gila.

I hereby certify, that I received the within Summons on the 2nd day of Dec., A. D. 1911, and personally served the same on the 29th day of Dec., A. D. 1911, on Cleve W. Van Dyke, being the defendant named in said Summons, by delivering to said defendant personally in the Territory of Arizona, County of Gila, a copy of said Summons, and a true and correct copy of the complaint in the action named in said Summons, attached to said copy of Summons.

J. H. THOMPSON, *Sheriff*.
By R. W. STURGES.

Dated this 29th day of Dec., A. D. 1911.
(Filed Jan. 8, 1912.)

Title of Court and Cause.

Amended Demurrer and Answer.

Now comes the defendant and as and for an amended
7 answer in the above entitled action demurs to plaintiff's complaint on file herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore, defendant prays that plaintiff take nothing by reason of this action, and defendant have judgment for his costs herein expended.

F. C. JACOBS,
Attorney for Defendant.

I.

In case said demurrer shall be overruled, and without waiving the same, the defendant in answering the first alleged cause of action stated in said complaint on pages one and two thereof, *m*enies each and every allegation contained therein.

In answering the second alleged cause of action stated in said complaint on page two thereof, the defendant denies each and every allegation contained therein.

In answering the third alleged cause of action stated in said complaint on page three thereof, defendant denies each and every allegation therein contained in said paragraphs one and two of said third cause of action and admits that on the 24th day of March 1910, the defendant paid plaintiff the sum of $2,515.66, but denies that after the payment thereof there became due or was due to plaintiff from defendant on said day a balance upon the three causes of action or otherwise in the sum of $15,364.75, or any other sum of money whatsoever.

II.

Defendant denies each and every allegation in said com-
8 plaint contained, except such allegations as are herein specifically admitted.

III.

Further answering said complaint and as a further defense thereto the defendant alleges that on the 10th day of January, 1909, the defendant was a resident of Arizona, and the owner of a certain option to purchase real estate situated in the County of Gila, Arizona, where the town of Miami is now located and adjacent thereto, and defendant was indebted on the purchase price of said property under the terms of said option in the sum of $25,000.00; that one Henry B. Hovland was a resident of Duluth, state of Minnesota, and was a mining promoter and engaged in promoting the formation of a corporation among others, to be known as the Cordova Copper Company, the object of which was to acquire mining property near the place where the said town of Miami and the property held under said option by defendant is located, and to prospect said property for mineral; that the land held by the defendant under said option at said time was and is considered to be valuable for the mineral contained therein, and the said Henry B. Hovland desired to obtain the mineral rights in said land below a point forty feet beneath the surface thereof for the said proposed corporation, the Cordova Copper Company, as a part of its property and as an inducement to the general public to invest its money in the stock of said Cordova Copper Company, and thereby provide funds with which to prospect and develop said mining property; that
9 about the 10th day of January, 1909, defendant and the said Henry B. Hovland, entered into a contract in which Henry B. Hovland was the party of the second part, and this defendant the party of the first part, which contract is in substance as follows, to-wit:

That the party of the first part is the owner of an option, giving him the right to purchase the following described real estate:

The N. E. ¼ and the S. W. ¼ of the S. W. ¼ of Section 30, Township 1 North, Range 15 East, Gila and Salt River Base and Meridian; and also the Duplex, Adonis, Venus, Gila, Little Joe, Copper Center, Henry, Mars and other mining claims situated in the Globe Mining District, Gila County, Arizona, the location notices of which are recorded in Book 8 of Records of Mines, in the office of the County Recorder of said Gila County, at pages 400, 401, 402, 403, 421, 441, also book 10, page 626, book 12, pages 327, 373 and 374, said property containing about 300 acres of ground more or less. The price for which the party of the first part has the right to purchase said property in the sum of Twenty-five thousand dollars ($25,000.00) payable at the Globe National Bank, at Globe, Arizona, in instalments as follows:

$5,000.00 on or before the 15th day of February, 1909.
$10,000.00 on or before the 15th day of July, 1909.
$10,000.00 on or before the 15th day of February, 1910.

All of said mining claims are valuable for mineral and
10 should be explored. The party of the first part desires that said claims should be explored as rapidly as possible but has not sufficient funds to explore them as rapidly as he desires.

The party of the second part and his associates are engaged in operating and developing mines in the vicinity of said land of the first party, but because of the ruggedness of the surface have great difficulty in securing satisfactory sites upon which houses may be constructed for their employés to live in.

For the purpose of facilitating the mining operations and for the purpose of securing suitable residences for the employés, the parties hereto, in consideration of the premises and one dollar ($1.00) paid the party of the first part by the party of the second part, agree as follows:

First. The party of the first part will cause to be forthwith organized under the laws of the Territory of Arizona a corporation to be known as the Miami Company, the object of which shall be to build a town upon the above described lands of the party of the first part. The capital stock of said corporation shall be one hundred and fifty thousand dollars ($150,000.00) to be divided into fifteen thousand (15,000) shares of the par value of ten dollars ($10.00) each. Of said capital stock one hundred thousand dollars, divided into ten thousand shares, shall be preferred stock, and fifty thousand dollars, divided into five thousand shares, shall be common stock. The preferred stock shall entitle the holder thereof to receive out of the net earnings, and the corporation shall be bound to pay thereon out of such net earnings, a fixed cumulative dividend of six per
11 cent. per annum. All the net earnings of this corporation after the payment of dividends due on preferred stock shall be applied to the purchase of outstanding shares of preferred stock. So soon as there are funds in the hands of the corporation applicable for that purpose, it shall purchase from the holder or holders thereof as many shares of the preferred stock, as the said funds applicable to that purpose will enable it to, and from time to time as it becomes possessed of additional funds applicable to that purpose it must continue to make such purchases until the entire outstanding issue of preferred stock has been purchased and owned by the corporation.

The party of the second part shall forthwith subscribe for twenty-five thousand dollars' worth of the preferred stock, payable as follows:

$1,000.00 payable upon the execution of this contract.
$4,000.00 payable on or before February 1st, 1909.
$5,000.00 payable on or before February 12th, 1909.
$5,000.00 payable on or before July 10th, 1909.
$10,000.00 payable on or before February 10th, 1910.

Certificates of stock shall be issued upon date of receipt of the money for the total amount of money received.

Second. As soon as $10,000.00 shall have been paid into the corporation for the preferred stock by the party of the second
12 part, the party of the first part shall forthwith place in escrow in the Miners & Merchants Bank at Bisbee, Arizona, deeds for the so much of the mineral of said land as may be found below the depth of forty feet with the right to mine and remove the same. These deeds will be accompanied by escrow instructions requiring the fulfillment of the terms of this contract before they shall be delivered to the party of the second part, his assigns or heirs.

Third. The party of the second part is the holder of an option on several mining claims known as the Eureka Group, situated in the Globe Mining District, Gila County, Arizona. The party of the second part hereby agrees for himself, his heirs and assigns to organize a company or companies to prosecute the work of developing said Eureka Group. The company or companies shall take over all of the claims of the Eureka Group and the mineral rights of the above mentioned land and mining claims and such other claims or mines as the party of the second part, his heirs and assigns may desire to place with these claims.

As a part of the consideration for the transfer of all of the mineral rights below the depth of forty feet in the lands and mining claims above mentioned by the party of the first part to the party of the second part, the party of the second part, his heirs or assigns, will transfer to the party of the first part fifteen per cent (15 per cent) of the total capital stock of the mining company or companies so organized for the above mentioned properties. The stock so paid to the party of the first part by the party of the second part, his heirs or assigns shall be as follows: 20 per cent. of the total amount due shall be in part paid stock of the kind offered to the general public, and the remaining 80 per cent. of the amount due shall be paid in fully paid and non-assessable stock.

Fourth. The townsite company when organized shall when due pay the respective amounts hereinbefore set forth which the party of the first part owes under its options on the said lands and mining claims. The party of the second part, his heirs and assigns, agrees to do all necessary assessment and other work and bear all expense in order to secure patents for all mining claims hereinbefore set forth.

Fifth. All of the loans made by the party of the second part, his heirs or assigns to the townsite company in the way of purchase of preferred stock, shall be payable with interest as aforesaid, only out of the net earnings of the townsite company. Such earnings shall include among other things, net proceeds of sales of the real estate of the townsite company. After the loans are paid as aforesaid, and not before, the earnings of the townsite company shall be applied in the form of dividends upon its stock.

That at the time of entering into said contract the said Henry B. Hovland thereupon paid to defendant the sum of $2,000.00 as a part of the consideration of said contract, and thereafter the said Hovland, pursuant to the terms of said contract, caused the said Cordova Copper Company, plaintiff herein, to be organized, with a capitalization of $3,000,000.00, divided into 300,000 shares of the par value of ten dollars per share, and placed the corporate stock of the said Cordova Copper Company upon the market for sale to the general public; that upon the organization of said Cordova Copper Company the said Henry B. Hovland was made and became an officer of said corporation, to-wit: its president, and said corporation, with full and complete knowledge of the contract entered into with this defendant and the said Henry B. Hovland, adopted said contract and all the terms and conditions

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thereof, and did thereafter advance and pay to this defendant the sum of $15,000.00 under the terms of said contract so adopted by plaintiff; that defendant thereafter purchased in his name the property held by him under said option and the plaintiff thereupon represented to the public that it owned the mineral rights in the ground purchased by the defendant under his said option.

IV.

That pursuant to the terms of said contract, defendant caused to be organized a corporation known as the Miami Townsite Company, with a capitalization of $150,000.00, divided into 5,000 shares of common stock of the value of $10.00 per share and 10,000 shares of preferred stock of the value of $10.00 per share, and after the organization of said Miami Townsite Company this defendant transferred and conveyed to the said Miami Townsite Company the land purchased by him under said option aforesaid, reserving to himself all minerals and all rights therein below a depth of forty
15 feet beneath the surface thereof, and said Miami Townsite Company, upon its organization, adopted the contract hereinabove set forth and all the terms thereof; that the defendant thereupon became an officer of said Miami Townsite Company, to-wit, its president.

V.

That under the terms of said contract so adopted by plaintiff as aforesaid, the plaintiff became obligated to pay to defendant the full sum of $25,000.00 as a subscription to twenty-five thousand dollars' worth of the preferred stock, at par, of said Miami Townsite Company, a corporation, and as a part of the consideration for the transfer of said mineral rights; that plaintiff did, on or about the 8th day of March, 1909, pay to the defendant the sum of $5,000.00 under the terms of said contract, which is the same money mentioned in subparagraph two of plaintiff's alleged second cause of action, set forth on page two of its complaint herein, and the plaintiff did, on or about the 14th day of July, 1909, pay to the defendant the sum of $10,000.00 under the terms of said contract aforesaid, which is the same money mentioned in sub-paragraph two of plaintiff's alleged third cause of action, set forth on page three of plaintiff's complaint herein, making a total sum of $17,000.00 paid by plaintiff and the said Henry B. Hovland under the terms of said contract as consideration for the transfer of the mineral rights and its subscription to twenty-five thousand dollars' worth of the capital stock of said Miami Townsite Company, a corporation; that there is still
16 due and owing from plaintiff on its subscription to said twenty-five thousand dollars' worth of preferred stock of the Miami Townsite Company and the purchase price of said mineral rights the sum of $8,000.00 which plaintiff has not paid and that the same is now due and owing from plaintiff on its subscription to said stock, and as consideration for the purchase of said mineral rights.

VI.

That said Miami Townsite Company, a corporation, is able, ready and willing to issue and deliver to plaintiff herein twenty-five thousand dollars' worth, at par, of the preferred stock of the Miami Townsite Company upon the payment of said balance of $8,000.00 of the subscription therefor, as provided by the terms of said contract, and the said Miami Townsite Company is able, ready and willing to perform all the covenants and conditions imposed upon it under the terms of said contract; that the plaintiff has never demanded of the Miami Townsite Company, a corporation, the issuance to it of any of the capital stock of said Miami Townsite Company, a corporation.

That the plaintiff has never transferred to the defendant the fifteen per cent. of the total capital stock of the Cordova Copper Company, or any capital stock of the Cordova Copper Company under the terms of the contract aforesaid, as a part of the consideration for the transfer of the mineral rights in the property purchased by the defendant under the terms of his said option.

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VII.

That the defendant is able, ready and willing to convey or cause to be conveyed to the plaintiff herein the mineral rights below the depth of forty feet in the lands and property purchased by defendant under the terms of his said option; that no demand has ever been made upon the defendant by plaintiff or any one in its behalf for a conveyance of said mineral rights.

That there has been no net earnings or profits of the said Miami Townsite Company, a corporation, since its organization.

Wherefore, defendant prays that plaintiff take nothing by reason of its complaint herein, and that defendant have judgment for his costs herein expended.

F. C. JACOBS,
Attorney for Defendant.

As and for a further defense to plaintiff's alleged causes of action herein, and by way of counter claim and cross-complaint, the defendant alleges:

I.

That during all of the times mentioned herein, the defendant was and is a resident of the County of Gila, State of Arizona, and that the plaintiff, the Cordova Copper Company, is a corporation organized under the laws of the Territory of Arizona, and having its principal place of business in the County of Cochise, Arizona.

18

II.

That the plaintiff is indebted to the defendant in the sum of eleven thousand four hundred fifteen and 40-100 ($11,415.40) dollars for money paid to and for the use and benefit of the plaintiff within three years last past in the said County of Gila, Arizona, at plaintiff's

special instance and request; that said money has not been paid to the defendant, nor any part thereof, and there is still due, owing and unpaid from the plaintiff to the defendant the said sum of eleven thousand, four hundred fifteen and 40-100 ($11,415.40) dollars.

Wherefore, defendant prays that plaintiff take nothing by reason of its complaint herein and that defendant have judgment against plaintiff for the sum of eleven thousand, four hundred fifteen and 40-100 ($11,415.40) dollars, and his costs herein expended.

F. C. JACOBS,
Attorney for Defendant.

Filed April 26, 1912.

19 Title of Court and Cause.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the Plaintiff in the sum of $15,364.75 with interest thereon from the 24th day of March, 1910, at the rate of 6% per annum.

GUS WILLIAMS, *Foreman.*

Filed May 4th, 1912.

Judgment.

Title of Cause.

On motion of the plaintiff upon the verdict and record in this cause, the court now being fully advised, the plaintiff appear-
20 ing by Messrs. Nave & Campbell, its attorneys, and the defendant appearing by Mr. F. C. Jacobs, his attorney, it is hereby ordered, adjudged and decreed that the Cordova Copper Company, a corporation, plaintiff, do have and recover from Cleve W. Van Dyke, defendant, the sum of $15,364.75, with interest thereon from the 24th day of March, A. D. 1910, at the rate of six per cent per annum and its costs in this cause, found to be and fixed at the sum of $298.55, together with interest on said costs at the rate of six per cent per annum from May 4, 1912;

And it appearing to the court that by the levy of a writ of attachment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, the plaintiff has and has had a valid lien from the 2nd day of December, A. D. 1911 upon the following described property:

All that certain real estate situated in Gila County, Arizona Territory, conveyed to Cleve W. Van Dyke by that certain deed of conveyance of B. Britton Gottsberger and Helen M. Gottsberger, recorded in the records of said County in Book 17 of Deeds at pages 405 and 406, excepting that part thereof conveyed by the deed of the said Cleve W. Van Dyke and Ida A. Van Dyke, to Miami Townsite Company recorded in the records of said County, in Book 17 of Deeds at pages 413 to 416 inclusive, reference to which records of

which deeds is here made for the particular description of said real estate; and also all that certain real estate situated in said
21 county conveyed to the said Cleve W. Van Dyke by that certain deed of conveyance of Joseph F. Chisholm, recorded in the records of said County in Book 17 of Deeds at page 279, excepting those several portions thereof conveyed by said Cleve W. Van Dyke and Ida A. Van Dyke unto Leslie D. Van Dyke by their certain deed recorded in the records of said County in Book 17 of Deeds at pages 450 and 451, and to Miami Townsite Company by their certain deed recorded in the records of said County in Book 17 of Deeds at pages 457 and 458, and to D. D. Sullivan by their certain deed recorded in the records of said County in Book 17 of Deeds at page 278, reference to which several deeds is here made for the particular description of said real estate; and also all that real estate situated in said county conveyed to said Cleve W. Van Dyke by that certain deed of A. R. Malone, recorded in the records of said County in Book 17 of Deeds at pages 195 and 196, reference whereto is here made for the particular description of said real estate; and also all that certain real estate situated in said County conveyed to the said Cleve W. Van Dyke by that certain deed of J. J. Keegan and Jennie Keegan, his wife, recorded in the records of said County in Book 17 of Deeds at pages 358 and 359, reference to which is here made for the particular description of said real estate.

And it further appearing to the court that by the levy of a writ of attachment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila, the plaintiff has and has had a valid lien from the 5th day of December, A. D. 1911, upon the following described property:

22 Lots numbered 109 and 111 in Block 30 and lot numbered 122 in Block 52, all in the townsite of Warren, Cochise County, Arizona Territory, according to the map of said townsite filed for record in the office of the County Recorder of said Cochise County on the 11th day of January, 1907, in Book 1 of Maps at pages 106 to 110.

And it further appearing to the court that by the levy of a writ of attachment of the District Court of the Fifth Judicial District of the Territory of Arizona, in and for the County of Gila the plaintiff has and has had a valid lien from the 5th day of February, A. D. 1912, upon the following described property:

All of those certain mining claims situated in the Globe Mining District, Gila County, Arizona Territory described as follows, to-wit: The Copper Center mining claim, location notice whereof is recorded in Book 8 of the Records of Mines of said County, at page 441; the Sho Me No. 2 mining claim, location notice whereof is recorded in Book 14 of the Records of Mines of said County at page 557, and an amended location notice whereof is recorded in Book 15 of the Records of Mines of said County at page 174; the Cuprite mining claim the location notice whereof is recorded in Book 17 of the Records of Mines of said County at page 467; the Easy Money mining claim, the location notice whereof is recorded in

Book 19 of Records of Mines of said County at page 281; the Barite mining claim, the location notice whereof is recorded in Book 19 of Records of Mines of said County at page 400; reference to which location notices is here made for the more complete
23 description of the said mining claims; and also the Sho Me patent mining claim situated in the same County and District, the patent whereof is recorded in Book 5 of Deeds of Mines in the Records of said County at page 614, reference to which patent is here made for the more complete description thereof; and also all the right, title and interest of Cleve W. Van Dyke in the Myrtle lode mining claim situated in said County and District, patent whereof is recorded in Book 11 of Deeds to Mines in the records of said County at pages 99 to 101, reference whereto is made for the more complete description thereof, excepting that part of the said Myrtle lode mining claim conveyed by John H. Davis and Myrtle Davis to the Inspiration Copper Company by their conveyance recorded in Book 11 of Deeds to Mines in the records of said County, at pages 130 and 131.

And it further appearing from the uncontroverted answer of the Miami Townsite Company, a corporation, duly garnished herein, that on the 11th day of December, 1911, the said defendant was the owner of 1980 shares of the stock of said corporation, and that by the service upon the said garnishee, the plaintiff acquired a lien on the said 11th day of December, 1911, upon the then existing interest of the said defendant in the said shares of stock, and still has such lien;

Now therefore, it is further ordered, adjudged and decreed that the said liens and each of them be foreclosed upon all the rights, title and interest of the said defendant in and to the said
24 several tracts of real estate, as such right, title and interest existed on the several dates of the said liens as hereinbefore found to exist, and upon all the right, title and interest of the said defendant in and to the said shares of stock as the same existed on the said 11th day of December, 1911, and that an order of sale shall issue to the Sheriff of the County of Gila, State of Arizona, directing him to seize and sell, as under execution, the said real estate situated in said County of Gila and the said shares of stock, or so much thereof as may be necessary to satisfy such execution; and unto the Sheriff of Cochise County, State of Arizona, directing him to seize and sell, as under execution, said real estate situated in said Cochise County, or so much thereof as may be necessary to satisfy such execution, all in satisfaction of this judgment; and if the said property cannot be found or the proceeds of such sales be insufficient to satisfy this judgment, then to make the money or any balance thereof remaining unpaid out of any other property of the said defendant, as in the case of ordinary execution; for all of which let execution issue.

Done in open Court this 4th day of May, A. D. 1912.

A. G. McALISTER, *Judge.*

Filed May 13th, 1912.

Motion for New Trial.

Title of Cause.

Comes now the defendant Cleve W. Van Dyke and moves the above entitled court for a new trial of the above entitled
25 action upon the following grounds, to-wit:

1. That the court erred in its decisions in admitting evidence during the course of the trial of the above entitled action.

2. That the court erred in its decisions in rejecting evidence offered during the course of the trial of the above entitled action.

3. That the court erred in charging the jury in the trial of the above entitled action.

4. That the court erred in refusing instructions asked by the defendant in the trial of the above entitled action.

5. That the evidence given at the trial of the above entitled action does not sustain the verdict rendered by the jury in the trial of the above entitled action.

6. That the court erred in its decisions of questions of law arising during the trial of the above entitled action.

7. That the court erred in permitting the plaintiff to file *his* answer to the defendant's counter claim after the trial had begun.

8. That the court erred in refusing to strike out the plaintiff's answer to defendant's counter claim upon motion made by the defendant herein.

9. That the court erred in refusing to enter judgment for the amount of defendant's counter claim upon motion of the defendant in the above entitled action.

26 Wherefore, defendant prays that the judgment in the above entitled action be set aside, and that the defendant be granted a new trial herein.

Dated this 14th day of May, 1912.

F. C. JACOBS,
Attorney for Defendant.

Filed May 14, 1912.

Title of Court and Cause.

Bond on Appeal.

Know all men by these presents:

That the Southwestern Surety Insurance Company of Oklahoma is firmly held and bound unto Cordova Copper Company, a corporation, in the sum of $37,650.00, lawful money of the United States of America, which it promises to pay to said Cordova Copper Company, a corporation, upon the conditions hereinafter expressed.

The conditions of the above obligations are as follows, to-wit:

27 Whereas, the plaintiff in the above entitled action recovered a judgment against the defendant above named in the above entitled court on the 4th day of May, 1912, in the sum of $15,364.75,

together with costs in the sum of $298.55, which said judgment is duly entered in the judgment book of the above entitled court, and

Whereas, the defendant above named, Cleve W. Van Dyke, has appealed to the Supreme Court of the State of Arizona from said judgment, and desires to stay the execution thereof.

Now therefore, if the defendant Cleve W. Van Dyke, shall prosecute his said appeal with effect and shall well and truly perform the judgment against him in the above entitled action and pay such judgment as may be rendered against him in the Supreme Court upon appeal of the above entitled action, or on a dismissal of said appeal, then the above obligation shall be null and void and of no force and effect; otherwise the same is to remain in full force and effect.

In witness whereof The Southwestern Surety Insurance Company of Oklahoma has hereunto affixed its name and corporate seal this 29th day of July, 1912.

SOUTHWESTERN SURETY INSURANCE COMPANY,

[SEAL.] By W. H. AUSTIN, *Agent and Attorney in Fact.*

Indorsed: Filed and approved Aug. 1, 1912. J. W. Wentworth, Clerk, by Elsie Patton, Deputy.

28 Title of Court and Cause.

Minute Entries.

Be it remembered that heretofore and to-wit: On the 21st day of February, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order to Enter Demand for Trial by Jury.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Comes now the defendant herein and demands a trial by jury, which is ordered entered.

Be it remembered that heretofore and to-wit: On the 9th day of March, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order for Trial.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

It is ordered that this case be set for trial on April 11th, 1912, at 10 o'clock A. M.

Be it remembered that heretofore and to-wit: On the 9th day of April, 1912, the same being one of the regular juridical days
29 of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order for Trial.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

It is by the Court ordered that this case be reset for trial on Monday, April 29, 1912.

Be it remembered that heretofore and to-wit: On the 29th day of April, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

This case came on regularly for trial, plaintiff appearing by counsel, F. S. Nave, Esq., and the defendant appearing by counsel F. C. Jacobs, Esq., said defendant objects to the jurors in attendance upon this Court at this time, on the ground that they have not been drawn and summoned in the manner prescribed by law and thereupon the order of the court for the drawing of said trial jurors, the
30 notice of the Clerk to the Sheriff and two electors of Gila County, and the minutes of the Drawing of said Trial Jurors

are introduced and thereupon it is ordered that certified copies of the same be made and filed herein, and the motion to set aside the panel herein is granted.

Order to Issue Special Venire.

It appearing to the Court that the jurors in attendance upon this Court at this time have not been drawn and summoned in the manner prescribed by law, it is hereby ordered, and the sheriff of this county is hereby directed to forthwith summon thirty good and lawful men of this county to serve as trial jurors in this court, said jurors to be in attendance upon this Court at 1:30 o'clock P. M. of this day.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order Overruling Objection to Special Venire.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Comes now the defendant herein and objects to the issuance of a special venire for trial jurors and a trial by said jurors summoned on a special venire, on the ground that he is entitled to a trial
31 by a juror regularly drawn according to law, and thereupon said objection is by the Court overruled, which is ordered entered.

Order to Enter Sheriff's Return to Special Venire.

Comes now the sheriff and makes return of the special venire issued this day for thirty trial jurors, said return showing that he had summoned the following named jurors, to-wit: J. M. McPherson, A. A. McKenzie, John H. Davis, Ed. Knight, Cal Greer, Joe Tooke, James Hartley, Robert Shand, Henry McCarmic, Harry Peck, W. H. Dunham, Joe Saborrin, G. W. Williams, Charley Slack, W. S. Redman, Ed. Loony, Gus Williams, E. F. Knowles, W. L. Decker, Tom Williams, Frank Pascoe, Pete Butz, J. E. O'Neil, N. W. Hammons, George Rainey, Tony Neary, W. E. Keegan, J. H. McGuire, J. A. Pinyan, J. F. Henderson, whereupon the Court announced that all trial jurors having excuses to present should now come forward; whereupon Pete Butz is excused from jury service; whereupon the Clerk is ordered to write the names of trial jurors summoned on the special venire and not excused on separate slips of paper and place said slips in the trial jury box, which is done.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

32 *Trial Resumed.*

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE et al.

Plaintiff and defendant being present by counsel, the defendant now objects to the panel herein and asks that said panel be set aside, which motion is by the Court denied, whereupon both parties announce ready for trial and thereupon the Clerk is ordered to draw from the trial jury box, where*upon* he had deposited in the presence of the Court the names of trial jurors summoned and not excused, the names of twenty trial jurors and thereupon said jurors are drawn and said jurors so drawn take their places in the trial jury box and thereupon the Clerk is ordered to swear said jurors on their voir dire, which is done, and thereupon the Clerk is ordered to poll said jury which is done, and thereupon the plaintiff challenged Tony Neary which is allowed and said juror is excused and thereupon the name of Chas. Slack is drawn, and said juror is sworn; whereupon the plaintiff challenged Ney McCormic which is by the Court denied; whereupon J. M. McPherson is challenged by the plaintiff which is by the Court allowed and said juror is excused and thereupon the name of Cal Greer is drawn and said juror is sworn; the panel being now full and complete *and* the respective parties exercise their right to peremptory challenge and the following named persons were drawn according to law to constitute the jury
33 herein, to-wit: J. F. Henderson, Robert Shand, E. F. Knowles, J. E. O'Neil, N. W. Hammons, Tom Williams, Gus Williams, J. A. Pinyan, Frank Pascoe, James Hartley, Ed. Knight, and Cal Greer, who are duly sworn to try the issue joined between the plaintiff Cordova Copper Company and the defendant Cleve W. Van Dyke; whereupon the Court admonished the jury according to law and excused said jury for ten minutes, to which time the trial herein is ordered suspended and thereupon Court is ordered to stand at recess for ten minutes; subsequently Court reassembled pursuant to recess and the plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto; whereupon the trial is ordered resumed and thereupon the plaintiff reads its complaint to the jury and thereupon the defendant read his answer and cross-complaint, and thereupon the plaintiff called Cleve W. Van Dyke who is sworn and examined and cross-examined and thereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit A; whereupon the Court admonished the jury accord-

ing to law and excused said jury until Tuesday, April 30, 1912, at 9:30 o'clock A. M. to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the 30th day of April, 1912, the same being one of the regular juridical days
34 of said Court, the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury into Court and their names being called all answered thereto; whereupon the plaintiff asks leave of the Court to file at this time its answer to the cross-complaint and counter claim of the defendant, to which the defendant objects, which objection is overruled and the cross-complaint is ordered filed; whereupon the Court admonished the jury according to law and excused said jury until 11:15 o'clock A. M. of this day, to which time the trial is ordered suspended and thereupon Court is ordered to stand at recess until 11:15 o'clock A. M. of this day, and subsequently Court reassembled pursuant to recess and the plaintiff and defendant being present the Court admonished the jury according to law and excused said jury until 1:30 o'clock P. M. of this day, to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said
35 Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the defendant presents to the Court his motion for a continuance of this case and his affidavit in support thereof,

which motion is argued by the respective counsel and by the Court denied; whereupon the trial is ordered to proceed and thereupon Cleve W. Van Dyke resumed his testimony; whereupon the plaintiff introduced certain documentary evidence which is ordered marked Plaintiff's 1 for identification; whereupon the plaintiff introduced certain documentary evidence which is ordered admitted and marked Plaintiff's Exhibit B, C, D; whereupon the Court admonished the jury according to law and excused said jury for ten minutes, to which time the trial is ordered suspended; whereupon it is ordered that Court stand at recess for ten minutes, and subsequently Court reassembled pursuant to recess, and the plaintiff and defendant being present comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and thereupon Cleve W. Van Dyke resumed his testimony; whereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit E; where-
36 upon plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit F; whereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit G; whereupon the plaintiff introduced certain documentary evidence which is ordered admitted and marked Plaintiff's Exhibit H; whereupon the plaintiff introduced certain documentary evidence which is ordered admitted and marked Plaintiff's Exhibit I; whereupon the plaintiff introduced certain documentary evidence which is ordered admitted and marked Plaintiff's Exhibit J; whereupon the plaintiff introduced certain documentary evidence which is ordered admitted and marked Plaintiff's Exhibit K; whereupon the Court admonished the jury according to law and excused said jury until Wednesday, May 1, 1912, at 9:30 o'clock A. M., to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the 1st day of May, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all an-
37 swered thereto, whereupon the trial is ordered resumed and thereupon Cleve W. Van Dyke resumed his testimony; whereupon the defendant introduced certain documentary evidence which

is admitted and ordered marked Defendant's Exhibit A-1; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit B-2, whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked C-3, D-4; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit E-5, F-6; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit G-7, H-8; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit I-9; whreupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit J-10; whereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit 1; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit K; whereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibits M, N, O, P; whereupon the Court admonished the jury according to law and excused said
38 jury until 1:30 o'clock P. M. of this day, to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed; whereupon the plaintiff introduced certain documentary evidence which is objected to by the defendant and said objection is overruled and said exhibit is admited and ordered marked Plaintiff's Exhibit 2; whereupon the plaintiff introduced a part of a letter to be filed as an exhibit to which the defendant objects, which is overruled and said section of letter marked "3" is admitted and ordered marked Plaintiff's Exhibit R; whereupon the plaintiff called H. B. Hovland who is first duly sworn then examined and cross-examined; whereupon the plaintiff introduced certain documentary evidence heretofore marked Plaintiff's 1 for identification, which is admitted and ordered marked Plaintiff's Exhibit S; whereupon the plaintiff introduced certain docu-
39 mentary evidence which is admitted and ordered marked Plaintiff's Exhibit T; whereupon this being the usual hour

of recess the Court admonished the jury according to law and excused said jury for ten minutes, to which time the trial is ordered suspended; whereupon Court is ordered to stand at recess for ten minutes, and subsequently Court reassembled pursuant to recess, all court officers present, and the plaintiff and defendant being present comes now the jury herein into Court and their names being called all answered thereto and thereupon the trial is ordered resumed; whereupon H. B. Hovland resumed his testimony being cross-examined; whereupon plaintiff called David L. Fairchild who is first duly sworn then examined and cross-examined; and this being the usual hour of recess, the Court admonished the jury according to law and excused said jury until Thursday, May 2, 1912, at 9:30 o'clock A. M. to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the 2nd day of May, 1912, the same being one of the regular juridical days of said Court the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

40 2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE et al.

The plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered to proceed and thereupon the plaintiff called Michael McCarthy, who is first duly sworn then examined and cross-examined; whereupon the plaintiff introduced certain documentary evidence which is admitted and ordered marked Plaintiff's Exhibit U; whereupon the plaintiff rests, whereupon the Court admonished the jury according to law and excused said jury from the courtroom during argument of counsel; whereupon the defendant presents to the Court his motion for a non-suit, on the ground that the plaintiff failed to establish its cause of action, which motion is argued by the respective counsel and by the Court denied; whereupon the jury is ordered to return into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and thereupon the defendant called Cleve W. Van Dyke who is examined and thereupon the Court admonished the jury according to law and excused said jury until 1:30 o'clock P. M. of this day, to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the same
41 day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

The plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and thereupon Mr. Van Dyke resumed his testimony; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit L-12; whereupon the defendant introduced certain documentary evidence which is ordered marked Defendant's Exhibit M-13; whereupon the defendant introduced certain documentary evidence which is admitted and ordered marked Defendant's Exhibit N-14; whereupon both parties rest on the matter of the complaint and answer and now proceed on the cross-complaint and answer and thereupon Mr. Van Dyke is called by defendant and examined and thereupon the defendant introduced certain documentary evidence which is ordered marked Exhibit A for identification; whereupon the Court admonished the jury according to law and excused said jury for ten minutes to which time the trial herein is ordered suspended, and thereupon it is ordered that Court stand at recess for ten minutes, and subsequently Court re-
42 assembled pursuant to recess and the plaintiff and defendant being present comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered to proceed and thereupon Mr. Van Dyke resumed his testimony, and this being the usual hour of recess, the Court admonished the jury according to law and excused said jury until Friday, May 3, 1912, at 9:30 o'clock A. M. to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the 3rd day of May, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered

thereto, whereupon the trial is ordered resumed and thereupon Cleve W. Van Dyke resumed his testimony; whereupon the defendant introduced certain documentary evidence which is ordered marked Defendant's Exhibit B for identification; whereupon this being the usual hour of recess, the Court admonished the jury ac-
43 cording to law and excused said jury until 1:30 o'clock P. M. of this day, to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and thereupon Cleve W. Van Dyke resumed his testimony; whereupon the defendant moves the Court for a dismissal of the counter-claim herein, which is granted and said counter claim is dismissed without prejudice; whereupon the defendant rests and the plaintiff rests and thereupon the Court admonished the jury according to law and excused said jury until 3:15 o'clock P. M. of this day.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

44 2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present by counsel, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and no further evidence being introduced upon either side the case is submitted in argument by counsel for the plaintiff and this being the usual hour of recess the Court admonished the jury according to law and excused

said jury until Saturday, May 4, 1912, at 9:30 o'clock A. M. to which time the trial herein is ordered suspended.

Be it remembered that heretofore and to-wit: On the 4th day of May, 1912, the same being one of the regular juridical days of said Court the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Trial Resumed.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present, comes now the jury herein into Court and their names being called all answered thereto, whereupon the trial is ordered resumed and thereupon the case is further submitted in argument by the respective counsel, thereupon the case being now fully submitted the Court instructed the
45 jury orally the charge being taken down in shorthand by the official reporter in attendance upon this trial, and said instructions are reduced to writing and ordered filed in this case; whereupon the Clerk is ordered to swear two bailiffs and thereupon W. T. Wright and George Rainey are sworn and said jury retired in their charge to consider of their verdict.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court in said cause, which said order is in figures and words as follows, to-wit:

Order to Spread Verdict in Full upon the Minutes.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Plaintiff and defendant being present, comes now the jury herein into open Court in charge of their bailiffs sworn for that purpose, and their names being called all answered thereto, whereupon said jury is asked by the Court if they have agreed upon a verdict and said jury replied that they have, and thereupon they returned their verdict to the Court signed by the foreman thereof, and the Court announced the verdict and inquired if either side desired the jury polled, and thereupon the defendant requests that the jury be polled, which is done by the Clerk asking each juror individually if this is

his verdict, and said jurors each replied that it is; whereupon the Clerk is ordered to spread said verdict in full upon the min-
46 utes, which is done as follows, to-wit:

CORDOVA COPPER COMPANY, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

We the jury duly empaneled and sworn in the above entitled action upon our oaths do find for the plaintiff in the sum of $15,364.75, with interest thereon from the 24th day of March, 1910, at the rate of 6% per annum.

GUS WILLIAMS, *Foreman.*

Whereupon it is by the Court ordered that the jury herein be discharged from this case and they are excused and the Clerk is ordered to issue certificates of attendance and mileage to said jurors.

Be it remembered that heretofore and to-wit: On the same day the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words, as follows, to-wit:

Order for Judgment.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Whereupon the plaintiff moves the Court for judgment upon the verdict rendered herein and for the foreclosure of the lien of attachment and garnishment and for the issuance of an order of sale; whereupon it is ordered that judgment be rendered in favor of the plaintiff for the sum of $15,364.75 with interest thereon at the rate of six per cent per annum from March 24, 1910, and for the
47 foreclosure of the liens of the writ of attachment and garnishment upon the interest of the defendant in the property attached and garnished thereby, and ordering the sale thereof pursuant to law; whereupon upon motion of the defendant it is ordered that a stay of execution be granted for thirty days from this date.

Be it remembered that heretofore and to-wit: On the 16th day of May, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Order Continuing Motion.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

Comes now the defendant herein and presents his motion for a new trial which is ordered continued until Saturday, May 18, 1912, at 9:30 o'clock A. M.

Be it remembered that heretofore and to-wit: On the 20th day of May, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, in said cause, which said order is in figures and words as follows, to-wit:

Order Granting Motion to Strike.

48 2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE et al.

The plaintiff and defendant being present by counsel, the plaintiff now presents to the Court his motion to strike the motion for a new trial, which motion is arged by the respective counsel and thereupon J. W. Wentworth, Clerk of this Court is sworn and examined; whereupon said motion is by the Court granted; whereupon the defendant gives notice of his appeal to the Supreme Court of the State of Arizona from the judgment and order granting motion to strike the motion for new trial, which is ordered entered.

Be it remembered that heretofore and to-wit: On the 27th day of May, 1912, the same being one of the regular juridical days of said Court, the following order was made and entered, inter alia, in said Court, which said order is in figures and words as follows, to-wit:

Order Granting Stay of Execution.

2028.

CORDOVA COPPER COMPANY
vs.
CLEVE W. VAN DYKE.

It is by the Court ordered that a stay of execution be granted for sixty days from the 3rd day of June, 1912, during which time the

defendant may file his supersedeas bond, in accordance with a stipulation filed in said case.

49 Copies of the following designated papers which are contained in the Judgment Roll are omitted from this Transcript by direction of attorneys for Plaintiff in Error:—

Demurrer and Answer; Affidavits for Writ of Garnishment; Writs of Garnishment; Affidavit for Attachment; Writs of Attachment; Answer to Writ of Garnishment; Answer in Garnishment; Answers of Garnishees to Writs of Garnishment; Challenge to Alleged Regular Panel of Trial Jurors; Answer to Counter Claim and Cross Complaint; Affidavit and Motion for Continuance; Jury List; Cost Bill; Motion to Strike Motion for New Trial; Order for Transcript; Stipulation extending time to prepare and file Abstract of Record on Appeal; Notice of filing Transcript on Appeal; Stipulation extending time in which to prepare and file supersedeas bond.

50 *Clerk's Certificate on Appeal of Cause to the Supreme Court of the State of Arizona.*

STATE OF ARIZONA,
County of Gila, ss:

Superior Court, Gila County, Arizona.

CORDOVA COPPER COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

I, J. W. Wentworth, Clerk of the Superior Court of Gila County, The State of Arizona, do hereby certify that the attached written and typewritten pages contain a true and correct copy of all the minute entries made in the above entitled case, and of the bond on appeal, and that the papers hereto attached are all of the papers constituting the record in said case.

That these papers constitute the entire record in said case excepting præcipes and subpœnas, which remain on file in the Clerk's office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Globe, Arizona, this 7th day of September, A. D., 1912.

[SEAL.] J. W. WENTWORTH,
Clerk of said Court.

50*a* In the Superior Court of Gila County, the State of Arizona.

CORDOVA COPPER COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

I, the undersigned Clerk of the Superior Court of Gila County of said State, do hereby certify the foregoing to be a true copy of the

judgment entered in the above entitled action, and recorded in Judgment Book No. 1 of said Court, at page 31. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and seal of the Superior Court this 13th day of May, 1912.

[SEAL.] J. W. WENTWORTH, *Clerk,*
By ELSIE PATTON,
Deputy Clerk.

51 And on the same day, to-wit: the sixteenth day of September, 1912, came the appellant by his attorneys, and filed in the Clerk's office of said court in said entitled cause, a certain Reporter's Transcript of Evidence, in words and figures following, to-wit:

In the Superior Court of Gila County, State of Arizona.

No. 2028.

CORDOVA COPPER COMPANY, a Cor., Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Reporter's Transcript.

Appearances:

F. S. Nave, for plaintiff.
F. C. Jacobs, for defendant.

Be it remembered: That this cause coming on to be heard this 29th day of April, A. D., 1912, at Globe, Gila County, Arizona, in said Superior Court, before Honorable A. G. McAlister, Presiding Judge of said court, and a jury, the following proceedings were had, to-wit:

The COURT: The Cordova Company, a corporation vs. Cleve W. Van Dyke. Both sides ready?

Mr. NAVE: Plaintiff is ready.

Mr. JACOBS: The defendant has a motion to make in this
52 case before the trial: The defendant challenges the jury as not being regularly drawn in accordance with the law.

The COURT: Do you desire to resist the challenge to the panel?

Mr. NAVE: We have no worry as to the validity of the jury.

Mr. JACOBS: Our present Supreme Court has, while it has not expressed its opinion, the Judges of the Supreme Court, I am informed, have expressed themselves to the effect that no jury, in a civil or criminal action, drawn since statehood and before the enabling act, we may call it an enabling act for the calling of jurors—an emergency act, is valid. They evidently differ from Judge Nave in that regard.

Mr. NAVE: If the Court please, I think it will take less time if the Court will look into the process of the summoning of this jury,

and if it is not correct, grant the motion and issue a special venire, having it returnable within twenty minutes, under Section 2807 of the statute, and there will be no question then.

Mr. JACOBS: May it please the Court, when officers are present whose duty it is to be present, the defendant or plaintiff to a civil suit or in a criminal action are entitled to a regularly drawn jury, and that is what we are insisting upon in this case; We insist
53 upon a regularly drawn jury. We object to a special venire on the same ground as this regular panel. We are entitled to a regularly drawn jury, and unless that jury is drawn in accordance with the law we shall simply object to a special panel.

The COURT: Possibly the shortest way around it would be to allow the motion so far as this case is concerned and direct the Sheriff to summon a special venire.

Colloquy between Court and counsel.

Mr. JACOBS: I request at this time that your Honor issue an order directing the Sheriff to secure a jury from the body of the County and not from bystanders and not from the immediate vicinity of Globe. I think that is what we are entitled to; otherwise we will have another motion in here, and take testimony for that, and we will have another panel to discharge very likely.

The COURT: How long do you want to make your showing Mr. Jacobs?

Mr. JACOBS: On what question?

The COURT: On the question of the challenge to the panel.

Mr. JACOBS: I thought your Honor had granted that motion.

The COURT: No; I have not granted it yet.

Mr. JACOBS: We merely want to introduce the record in the matter; the record of the drawing of this present jury and the
54 manner in which it was drawn. We want the order calling for the drawing of the jury and we want the call notice that was served and the return, and we want the minutes of the meeting where the jury was drawn showing those present and those not present; the entire proceeding is what we want. If we should go up in this action there is no showing here.

The COURT: Mr. Clerk will you produce the records?

The records are produced by the Clerk and examined by the Court and counsel.

Mr. NAVE: I confess the motion and ask for a special venire.

The COURT: On the showing made?

Mr. NAVE: Yes, if the court please, we move that the motion be granted and a special venire summoned.

Mr. JACOBS: We would like the record in the case to show that the defendant at this time excepts to the issuance of an order for a special venire for jurors to serve in this case and objects to the drawing of a special venire of jurors to serve in this case upon the further ground that the defendant in this case is entitled to a regularly drawn jury, under the law, in the manner prescribed by law before proceeding.

Mr. NAVE: The record should show that; we don't resist that at all; but the statute covers this case.

The COURT: It appearing to the Court that jurors have
55 not been drawn and summoned in the manner prescribed by law in this case, the sheriff of this county is hereby directed to summons thirty men to serve as trial jurors in this case, to be present here at 1:30 o'clock P. M.

Mr. JACOBS: May the records show the hour at which this order is made?

The COURT: Yes; made at 10:30 A. M.

Recess taken to 1:30 P. M. awaiting the return of the special venire.

After Recess.

The COURT: Mr. Clerk is there a return by the sheriff of the special venire?

The CLERK: There is your honor.

The COURT: Call them.

The Clerk calls the special venire. All present.

The COURT: Are you ready to proceed.

Mr. JACOBS: At this time, if the Court please, to make the records clear we wish to interpose an objection to the special venire on the ground that it is not a regular panel drawn in the regular manner, and we ask the Court to dismiss the jury.

The COURT: Let the record show that the defendant objects to the panel which has been brought in and asks that the panel be set aside and dismissed. And let the objection be overruled.

56 Jury selected and sworn.

Mr. NAVE: I wish to call Mr. Van Dyke for cross-examination under the statute.

The COURT: Very well.

Mr. CLEVE W. VAN DYKE, defendant, being first duly sworn, testified as follows:

Cross-examination.

By Mr. NAVE:

Question. Mr. Van Dyke you are the defendant in this case?

Answer. Yes, sir.

Question. You are Cleve W. Van Dyke?

Answer. Yes, sir.

Question. Have you read the answer which Mr. Jacobs just read to the jury?

Answer. Yes, sir.

Question. You are familiar with its contents?

Answer. Yes, sir.

Question. When was this contract set up in your answer entered into between you and Mr. Hovland?

Answer. In January, 1909.

57 Question. Judging from the appearance of it one would suppose it was a written contract?

Answer. Yes, sir.

Question. Was it in writing?
Answer. Yes, sir.
Question. Have you the writing?
Answer. Yes, sir.
Question. Will you produce it?
Answer. Yes; I have a copy of it. (Witness produces copy as requested).
Question. This paper you have just handed me is the contract you refer to?
Answer. Yes, sir.

Mr. NAVE: I offer it in evidence, if the court please.
The COURT: Let it be received in evidence and marked plaintiff's exhibit A.

Question. Now I understood you to say—This is marked plaintiff's exhibit A, you will observe. I understood you to say this is a copy of that contract?
Answer. Yes, sir.
Question. You observe, I presume, there are no signatures to this copy?
Answer. Yes, sir.
Question. Was the original of that contract ever signed?
Answer. No, sir.
Question. Was the original of that contract ever shown to Mr. Hovland?
Answer. Yes, sir.
Question. When?
Answer. In January, 1909.
Question. Where?
58 Answer. At his office in Duluth, I think 903 Lawnsdale building, I forget the exact address.
Question. Is the date of this instrument—It is dated the eighteenth day of January, 1909, is that the correct date?
Answer. I can't—I don't recollect the exact date. I don't know. I would have to go back to my memorandum to find out.
Question. You are confident that was in the month of January, 1909?
Answer. Yes, sir.
Question. You are not in danger of any confusion upon that?
Answer. No, sir.
Question. Do you recollect when you left Duluth; that is after that trip?
Answer. Well now I was, as I recollect it, I was in Duluth the latter part of January and first part of February; and the way I recollect it, it was the latter part of January that I first went there, and I called on him again I think the first part of February. I don't know the exact dates, I don't remember, but I know it was about that time.
Question. I am interested in fixing the time exactly. You were married on that trip?
Answer. No, sir, I was married that spring.
Question. That spring?

Answer. I was married in the following March.

Question. Well, then at any event, of course, you can identify the case by the date of your marriage. This was before your marriage?

59 Answer. Yes, sir.

Question. Your marriage was in March, 1909.

Answer. Yes, sir.

Question. About that we can have no later dispute; that is I mean you won't dispute that?

Answer. How do you mean?

Question. You will not dispute that this paper you refer to, the original, was submitted to Mr. Hoveland earlier than 1909?

Counsel for defendant objects to the question as improper, irrelevant and immaterial.

Objection overruled.

Answer. I don't understand.

Question. My point is this: I want to ascertain whether you are absolutely certain—so certain that you will predicate your rights upon it by saying you will not, under any circumstances, dispute the fact that you submitted the original of this paper to Mr. Hoveland before you were married?

Answer. I was with Mr. Hoveland two days discussing the contract. That is a copy of the paper I had with me at that time.

Question. You showed it to him?

Answer. Yes, sir.

Question. At that time?

Answer. Yes, sir, my recollection——

Question. And you know you were married in March, 1909?

Answer. Yes, but not there.

Question. I am not after getting the place. You know you were married in March, 1909?

60 Answer. March 8th, 1909, in El Paso.

Question. It was before you were married that you were in Duluth with Mr. Hoveland, was it?

Answer. Yes, sir.

Question. No doubt at all about that?

Answer. No, sir.

Question. That is something you don't want to retract? No possible mistake about it?

Answer. That I was in Duluth prior to March?

Question. Before your marriage?

Answer. Yes, sir.

Question. Before March?

Answer. Before March, 1909; yes, sir.

Question. You are absolutely certain that it was before March, 1909 that you saw Mr. Hoveland and showed him the original of which this is a copy?

Answer. Yes, sir. I want to make a further statement there, that that was not the only time.

Question. No; but you did do it on that date?

Answer. Yes, sir; discussed it with him in detail for two days.

Mr. NAVE: With permission of counsel I will state to the jury what this paper is. This paper Mr. Van Dyke has just handed me, gentlemen, is a copy of what Mr. Jacobs read to you when he read the answer of Mr. Van Dyke.

Question. You didn't leave a copy with Mr. Hoveland?
61 Answer. Well, I don't recollect. My recollection is that I furnished him a copy, but I don't recollect whether it was at that time or later, but my recollection is that I have furnished him with a copy. It seems to me he requested a copy later and it was sent to him.

Question. Did Mr. Hoveland at that time state to you that this represented his understanding of the agreement between you?

Answer. That was my understanding at that time.

Question. Is that what he said?

Answer. With some qualifications in his statement. I was dealing with other parties there at the time and Mr. Hoveland and these other parties—I was discussing the sale of this to both parties and I had been with Mr. Hoveland, as I remember, about two days in the discussion of it, and he called me to his office and we discussed this contract. I discussed no other terms or conditions except this contract. That was the only contract I was willing to do business with him under. I supposed at the time that I was there that he was familiar with all the details of the contract and understood them. He called me into his office late in the evening, I should judge after dinner, sometime along about eight o'clock, and he said "I have suddenly been called to New York and I have got to go there hurriedly, and I believe I want to make a payment on this note at this time;" but he said there were, as near as I can remember it, that there were some details that before he made final payments that he wanted to investigate: He wanted a map of the place
62 and he wanted to look over the ground in Arizona, and he said he would make payment of two thousand dollars down that night in order to protect me and in order to close the contract; and after he had this chance to investigate the situation he would pay the balance that was due on the contract. Now that was that evening——

Question. And he paid two thousand dollars at that time?

Answer. He paid two thousand dollars at that time and asked me to sign a note—a two thousand dollar note issued by the Live Oak Copper Company. Now the reason he gave me at the time for asking me to sign the note was that the companies that we had been discussing were not yet organized, but that he felt justified on behalf of the Live Oak Copper Company, he felt justified in making this advance out of the funds of the company. He demanded of me a note which was due, as I remember it, along about May sometime, and by that time we would have the companies organized and they were to take over this note and fulfill the agreement.

Question. You had then at that time, at least formally obligated yourself to repay that money?

Answer. With the understanding that it was to be taken over by the new company and that this contract would be fulfilled.

Question. Now, notwithstanding the fact that by signing that note you promised to repay that two thousand dollars to the
63 Live Oak Company a short time thereafter, the real fact is that Mr. Hoveland paid that two thousand dollars on this contract, is that correct?

Answer. That is my understanding.

Question. That was your understanding at the time?

Answer. Yes, sir, and it is yet.

Question. That is to say, that was one of the payments to be utilized by you upon the organization of your Townsite Company for a partial payment on subscription to preferred stock?

Answer. How was that?

Question read.

Answer. Do you mean judge, that this money was to be a partial——

Question. Return for this money should be special stock. I mean preferred stock of the townsite company?

Answer. Yes, sir.

Question. That was your belief at the time?

Answer. Yes, sir.

Question. That was what Hoveland and yourself stated right there?

Answer. There were some conditions. You will note by the contract that the assessment work and patent work should be done by the Mining Company. There was assessment work going on at that time; engineering and assessment work, and a portion of this money was to be used for that purpose, intended, as I remember——

Question. Notice it says—What I am trying to get at, of
64 course, is not what you are going to do with the two thousand dollars, but what Hoveland was to get out of the two thousand dollars. That was what you and he said at the time: Preferred stock in your townsite company?

Answer. Yes.

Question. That is it?

Answer. Yes.

Question. Of course, as you say, you used this two thousand dollars for different things?

Answer. Yes, sir, assessment work, which was to be charged against their company; anything that pertained to the mineral phase of the property.

Mr. NAVE: Now, by the way, I stated to the jury a moment ago that this was a copy of what was set up in the answer to the complaint. You will have noticed perhaps that the first four lines of this is not in your answer. Reads: "This agreement made this eighteenth day of January, 1909, between Cleve W. Van Dyke of Warren, Arizona, party of the first part, and Hoval A. Smith of Bisbee, Arizona, party of the second part," instead of Mr. Hoveland. Explain that if you will?

Answer. Well, this document had been drawn, it was drawn at Warren, Arizona before my trip to Duluth, and Mr. Smith and Mr. Hoveland was partners, and it was customary sometimes to use the

name of one and sometimes the name of the other in drawing up the various instruments, and I presume when this was drawn Mr. Smith being present in Arizona (he was not present when this contract was drawn), his name was used.

65 Question. Then this paper wasn't actually dictated or typed in Duluth?

Answer. No, sir.

Question. It was typed in Arizona?

Answer. Yes, sir.

Question. Before you ever went to Duluth?

Answer. Yes, sir.

Question. Do you know about how long before?

Answer. I think the same day, I am not confident, that I left. I think it was typed the same day I left for Duluth.

Question. Then the date "This eighteenth day of January" doesn't necessarily give any clue to when you and Hoveland had his agreement?

Answer. I don't recollect about the date, I could look it up. But I know it was sometime along about the latter part of January or first part of February that I made my two visits to Duluth.

Question. Do you recollect how long you were in Duluth in January?

Answer. Not exactly. It seems to me that I was there on that trip three or four days.

Question. How long?—You were not there so long as a week?

Answer. I don't think so, not in Duluth. I was in Minnesota several weeks.

Question. I mean Duluth?

Answer. I think something less than a week and more than two or three days.

66 Question. How long on the latter trip of a few days later in February?

Answer. It has been a long time since I thought of it judge. It is over three years ago.

Mr. JACOBS: I think it would be immaterial what time in February and I object to it upon the ground that it is not proper cross-examination.

Objection overruled.

Exception by defendant.

Question read.

Answer. As I remember the time I left Duluth on the night of the 21st day of February. No, no, not the 21st, but the—The reason I recollect that was the day after I left, either on the night of the 11th of February or the night of the 21st of February, because the following day was a holiday, and I think it was the 11th day of February. I am not positive whether it was the day before Washington's birthday or the day before Lincoln's birthday.

Question. Did you receive five thousand dollars at that time?

Answer. I never received the five thousand dollars personally.

Question. What was done about that five thousand dollars?

Answer. The reason for my second visit to Mr. Hoveland was to have him come to Arizona to look over the ground according to our understanding and find out how closely it connected with his ground and what the points were that we had left the matter over
67 for; and I had requested a map, which I wired for to Arizona, and was gotten up by Sultan and Wayne, engineers, that was forwarded to me at St. Paul and I took this map up to his office and the payment was due, this five thousand dollar payment was due about the middle of February.

Question. That is to the people from whom you had an option?

Answer. Yes, sir. Mr. Hoveland understood that. And when I arrived in Duluth I found that Mr. Hoveland had not yet returned from New York, and so I wired to him at New York asking him what he intended to do in reference to the matter and he wired back that he would instruct Mr. McCarthy in Globe to pay the payment in my behalf providing it was satisfactory to me, as I remember it, and I wired back to the Holland House, as I remember, in New York, that that arrangement would be satisfactory to me, and Mr. McCarthy wired me to the effect that he had received instructions to make the payment and would abide by them.

Question. You afterwards found that the payment was made?

Answer. Yes, sir.

Question. When?

Answer. They sent me a voucher later after I returned here. It seems to me in March sometime. I signed the voucher showing the payment had been made according to our contract.

Question. This five thousand dollars just discussed was also meant to be applied, in so far as its return to Mr. Hoveland or the
68 companies were concerned, in the purchase of preferred stock in your company that was to be organized, is that right?

Answer. Yes, sir. It was not organized at that time.

Question. But it was to be applied on preferred stock when it should be organized?

Answer. Yes, sir.

Question. That is the only understanding that you had?

Answer. That was the understanding.

Question. Is that the only understanding?

Answer. Except with the conditions that I named.

Question. But that is the only understanding that you had as to the consideration that his company should get out of it?

Answer. Well the dividends that came from the preferred stock; they were to pay six per cent. accumulative dividend, and this interest was made the same amount to conform to the six per cent. accumulative dividend.

Question. What?

Answer. On this two thousand dollar Live Oak note.

Question. This two thousand dollar Live Oak note called for six per cent.?

Answer. Yes, sir, and that was made to correspond with the six per cent. accumulative dividend of the new townsite company which was to be organized.

Question. Now the arrangement with Hoveland was that
69 as soon as your company could get the funds availa-le for its purchase, it should buy in this note?

Answer. Yes, sir.

Question. Then Hoveland was to get the two thousand dollars back with six per cent. accumulative dividend?

Answer. Yes, sir.

Question. And that would clean that out; that is, as far as his holding was concerned, and this company was to be organized in such a way that this preferred stock would be a lien directly on all property, so as to protect him in getting his money back?

Answer. Yes, sir, that was the understanding.

Question. Then in order to make it more profitable both for you and Hoveland you had an agreement with Mr. Hoveland made so that under this option that you had for the purpose of your townsite ground, Hoveland and his companies were to have the mineral rights below forty feet and you have stock in Hoveland's companies amounting to fifteen per cent.

Answer. Yes, sir.

Question. That was definitely agreed upon by you and Mr. Hoveland in January before the payment was made?

Answer. That was my understanding.

Question. It was definitely agreed upon?

Answer. That was my understanding.

Question. That you have fifteen per cent?

Answer. Yes, sir.

70 Question. You stated that before he paid anything?

Answer. With the conditions I named; that he had the privilege of looking over the ground before making payment.

Question. And unless he backed out you were to have fifteen per cent. of the stock in the company he was to organize?

Answer. He wasn't supposed to back out if conditions were as I represented them, because it would put me in a very bad position. I was dealing with those other people at the time and this money was paid me so I could feel the matter was closed and cease negotiations with the other people, which I did.

Question. Then this first two thousand dollars was paid with the express understanding between you and Hoveland that you were to have fifteen per cent. of the stock of the mining company that Hoveland was to organize?

Answer. Yes, sir. Of course, we didn't discuss that he was to organize the kind of a mining company that he finally did organize.

Question. Fifteen per cent. was fixed?

Answer. I discussed the organization of a company something like the Live Oak Copper Company, and after I left there they included the Globe Consolidated.

Question. But in any event you had an agreement that it should be fifteen per cent?

Answer. Yes, sir.

Question. And you had some time in which to answer?

71 Above anything else I don't want us to be in a position when we get through that we don't know what we mean. I want

to be sure that your understanding and agreement with Mr. Hoveland in regard to that fifteen per cent. was before Hoveland paid any of the money?

Answer. I never saw Mr. Hoveland for several months after he paid me the money.

Question. Well you haven't answered my question——

Answer. Let me finish. We had been discussing this off and on for two or three days when, as I said, he had this sudden call to New York. He called me in his office immediately and paid me two thousand dollars. He made this payment with the understanding that this was the contract. This was the understanding absolutely.

Question. It was at that time and not later that you had the express understanding with him that you were to have fifteen per cent. of the mining company he was to organize?

Answer. Yes, sir.

Question. We will have no misunderstanding on that feature then?

Answer. No, sir.

Question. Now just as a matter of straightening out some little details that may trouble us if we don't, under this contract you were to organize a company called the Miami Townsite Company. As a matter of fact didn't you organize a company called the Cordova Townsite Company?

Answer. Yes, sir.

72 Question. Why didn't you organize the Miami Townsite Company?

Answer. At the request of Mr. Hoveland and Mr. Smith, they asked me to call it the Cordova Townsite Company. This was some time after they had selected the name of the mining company, Cordova Mining Company, they asked that the town be named after the mining company. I granted their request, and consequently this company, when it was organized, was called the Cordova Townsite Company; and the company was organized as the Cordova Townsite Company for that reason. But when this contract was drawn the name of the new companies, the new mining company and townsite company had not been determined.

Question. Now this contract provided that as soon as ten thousand dollars should have been paid in to you for preferred stock, that you should put in escrow at the Miners and Merchants Bank, in Bisbee, deeds for the mineral rights on that land below forty feet? Did you ever do that?

Answer. No, sir.

Question. Why?

Answer. They never demanded it.

Question. The contract said you should?

Answer. That is the reason I did not.

Question. You received a demand from me last week?

Answer. Yes, sir.

Question. But you haven't done it?

Answer. No, sir.

73 Question. You haven't complied with my demand?

Answer. No, sir. I turned the letter over to my attorney. The case is in his hands at present time.

Question. The reason you didn't place these deeds in escrow in the Miners and Merchants Bank at Bisbee was because they never asked you to?

Answer. Never asked me to, no sir.

Question. In your answer here you say, Mr. Van Dyke, that you are able, ready and willing to convey, or cause to be conveyed, the mineral rights below a depth of forty feet. Is that true?

Answer. Yes, sir.

Question. You are able to do so?

Answer. Yes, sir.

Question. The mineral rights are still in your control?

Answer. Yes, sir.

Question. As a matter of fact they have not been transferred to your brother?

Answer. No, sir, they have been transferred to Mrs. Ida A. Van Dyke.

Question. That is your wife?

Answer. Yes, sir.

Question. That doesn't give her absolute control?

Answer. The understanding is this: That at any time this contract is to be protected she will do so.

Question. That wasn't done by you in order to beat us out of the mineral rights?

74 Answer. No, sir. When I organized my township company I had but little funds, almost no funds, and my wife had some money, and most of the money that was put into the township company belonged to Mrs. Van Dyke, outside of the money taken over on this deal, and the larger share of the ownership there belongs to her, and as rapidly as I get my business in shape I have deeded it to her, with the understanding that she would protect absolutely any condition of this contract, of this kind.

Question. And your creditors?

Answer. Yes, sir.

Question. That is to say, you were not intending to beat us or your creditors?

Answer. No, sir. I have no creditors except small ones. Mrs. Van Dyke has that understanding that she will protect all of them, and any time the mineral rights are demanded under this contract she will deed it. That is one of the stipulations I have with Mrs. Van Dyke in regard to the matter.

Question. Now, you stated you have never offered to pay, in this case, any of that preferred stock, Mr. Van Dyke, isn't that true?

Answer. They have never demanded it.

Question. You have never offered to pay?

Answer. I have never offered to pay for that reason.

Question. You have received some seventeen thousand dollars from them?

Answer. Yes, sir.

Question. They have got nothing from it?

Answer. I have always been prepared.

75 Question. They got some twenty-five hundred dollars back?

Answer. Not on that account; that is an entirely different matter. They assumed the ownership of this ground; their engineers came down there and surveyed the ground and it was claimed by them and included in the Cordova Copper Company and maps were gotten up.

Question. You knew that at the time didn't you?

Answer. Yes; and it was sold. That was included in the copper company and stock sold on the basis of the including of these, my mineral rights and their mineral rights. This money that came to me was part of the money that was received, I presume, from the sale of our property. I had some 285 acres and they had some 125 acres, and this money was received from the sale of stock which this ground was supposed to represent.

Question. At that time you in good faith assumed that they had the right to so dispose of it?

Answer. Yes, sir, absolutely.

Question. You didn't question their right in these mineral rights?

Answer. Providing they fulfilled the agreements of my contract it is absolutely their ground. There never has been any doubt in my mind about that.

Question. And never will be?

Answer. No, sir.

Counsel for defendant objects as not proper cross-examination, irrelevant and immaterial.

Question and answer read.

76 Answer. I never answered like that.

Question. State what you did mean and say so we will have it in your own language?

Objection by counsel for defendant.

Objection overruled.

Counsel for defendant excepts.

Answer. Now I don't quite understand what you want?

Question. All I want is the facts. I want to know—You said the way I said wasn't what you meant; and what I want to know is whether you actually recognize to this minute the right of the Cordova Copper Company to own those mineral rights provided it has fulfilled its contract.

Objection by counsel for defendant as not proper cross-examination.

Objection overruled.

Defendant excepts to the ruling of the court.

Question read.

Counsel for defendant makes a further objection as being irrelevant, immaterial and not proper cross-examination.

Objection overruled, to which ruling of the court counsel for defendant then and there duly excepted.

Answer. My position—What you want to know is my position in reference to my questioning the Cordova Copper Co. to own those mineral rights as stipulated in this contract?

Question. If we fulfill our part of the contract do you recognize that we own those mineral rights now?

Answer. If everything is fulfilled according to the agree-
77 ment made with Mr. Hovland up in Duluth, I am prepared to do just as I said I would do at this time.

Question. If we fulfill all that Hoveland agreed we would do, we would be entitled to those mineral rights?

Answer. If he fulfills our agreement according to our understanding as stipulated in this agreement, yes, sir. If Mr. Hoveland fulfills the agreement that he entered into with me in Duluth, yes, sir. If he fulfills my contract, yes, sir.

Question. That you think he had in Duluth?

Answer. Yes, sir.

Question. If he and his company fulfills the agreement that they had with you would they be entitled to those mineral rights?

Counsel for defendant objects as having already been answered.

Objection overruled.

Question read.

Answer. I don't like to have to answer something that I can't do myself justice; that I can't be honest with myself in.

Question. Then you don't mean to say that you are perfectly willing to stand by your contract, no matter what that contract actually is?

Answer. I know what that contract is. There is no doubt in my mind about that, and never has been.

Question. Are you willing to stand by your contract no matter what it is?

78 Answer. I am willing to stand by my contract such as I know it to be.

Question. Then not unless you know it to be——

Answer. I am not willing to have you come in here and try to have me stand by some contract not my contract.

Question. Then if I can prove the contract to be a different contract from the one you now say——

Answer. I don't know whether you can prove it or not——

Question. Wait a minute——

Counsel for defendant requests that the witness be allowed to go ahead and answer the question.

Whereupon counsel for plaintiff remarks: "I know Mr. Van Dyke. He will talk for an hour and then not answer the question."

To which remark counsel for defendant objects, stating that it is prejudicial against the witness.

The COURT: Let the record show, Mr. Reporter, that the defendant objects to the remark.

Question. Now in order to prove my remark was unjust to you Mr. Van Dyke, please do me the favor, or rather do the court the

favor, to answer me one question yes or no. Your position then is this: That if we should satisfy this jury that you are mistaken what the contract is, then you won't keep it? Answer that yes or no?

Counsel for defendant objects. Ground not stated.
79 Colloquy between counsel.
Objection overruled.
Exception by counsel for defendant.
Question read.

Answer. I can't do justice to myself by saying yes or no in answer to that question.

Question. Do you recognize that if the Cordova Copper Co. performs, or shall have performed, its contract with you, that it is entitled to the ownership of those mineral rights?

Witness requests that the question be read to him, which is done.

Counsel for defendant objects to the question on the ground that it contains two propositions.

Objection overruled.

Question read.

Answer. How shall I answer that Judge?

The COURT:

Question. Answer it yes or no?

Answer. I can't answer it either way and be honest with myself or with the interests that I represent.

Question. We will try it once more. Is your position this? That the contract——

Answer. I can tell you what my position is if you will let me.

The COURT: Can you tell it in a short time?

Answer. Yes. My position is that this is the contract which represents our understanding. This has been in printing, and from the beginning we have had the understanding, under the laws of
80 this contract, that if the Cordova Copper Company can't fulfill it, the conditions of this contract——

Question. You are talking about this typewritten contract?

Answer. Yes, sir.

Question. I want you to talk about the actual contracts?

Answer. And that is the actual contract——

Question. If that is the actual contract then your answer can't hurt you, can it?

Answer. No.

Question. You know this is the contract?

Answer. Yes, sir, I do.

Question. If we should show that this is another contract then you want to be understood that you won't stand by the contract you made?

Answer. You can't show such a thing legitimately, judge. We dealt under that contract for over half a year. My Townsite Company was organized that way. Everything I have in the world.

There is no other contract. I can't answer hypothetically about another contract. I never had a different understanding, and I have discussed it numerous times.

Question. Then we understand you? You profess to be a man of education and intelligence?

Answer. Yes, sir, I——

Question. Then you, with that confidence in yourself, assert now that you can't answer yes or no unqualifiedly this question: Whether or not you are willing to stand by your actual contract?

Answer. I am willing to stand——

81 Question. You are not willing to answer that yes or no?

Counsel for defendant objects on the ground that counsel is trying to ascertain from the witness if he will fulfill the terms of another contract than the contract described in defendant's answer.

Colloquy between counsel.

Objection overruled.

Question read.

Answer. I say that is the actual contract and I am willing to fulfill its terms.

Question. You are indulgent in that answer, Mr. Van Dyke. Answer that other question yes or no?

Answer. ——.

The COURT: Can you answer it yes or no?

Answer. ——.

Question. Can you answer this question yes or no? I don't ask you to answer the question, just want to know whether you can answer it yes or no; Will you keep your contract with Henry B. Hoveland?

Answer. Yes, I will keep the contract with Henry B. Hoveland; and that is the contract.

Jury admonished and recess taken to 9:30 A. M. April 30, 1912.

After recess. Roll call of jury. All present.

Mr. JACOBS: May it please the court, in this case the defendant filed with its answer and cross-complaint *or* counter claim alleging that the defendant had advanced to and for the use of the plaintiff,

the Cordova Copper Company, the sum of eleven thousand
82 and some odd dollars, and this case went to trial on yesterday without any answer to the cross-complaint being filed. The case has now been at trial for one day, and this morning counsel for the plaintiff has attempted to serve upon me what he styles an answer to the cross-complaint. The matter was presented to the Clerk for filing and I objected to the filing of it and I still object to the filing of it. I wish to make an objection at this time, and wish it to appear in the record, with the permission of the court.

The COURT: You may do so.

Mr. JACOBS: We object to the filing of this alleged answer to the counter claim and cross-complaint, for the reason that the defendant answered ready for trial on the 29th day of April, and at the

time of answering ready for trial, and at the commencement of this trial, there was no issue tendered by the plaintiff in the form of an answer, demurrer or otherwise; but that the counterclaim and cross-complaint pleaded by the defendant in this case, and all of the items thereof, and the total amount thereof, was admitted by the plaintiff as being due and payable from the plaintiff to the defendant, by reason of the failure of the plaintiff to answer or demur to said cross-complaint, or to deny the truth of the allegations therein, or any of such allegations; that had an answer been filed by the plaintiff, or had an issue been tendered by the plaintiff to said cross-complaint, the defendant would not have answered ready for the trial of this case, but would have sought a continuance of the trial thereof for the purpose
of enabling the defendant to obtain proof of certain items of
83 said account that the defendant believes he doesn't possess
at this time; and for the foregoing reasons the defendant objects at this time to the filing of any answer by the plaintiff to the cross-complaint herein or tendering to the defendant any issues thereon, and the defendant now moves the court to strike from the files.

Colloquy between court and counsel.

The COURT: It seems that the status of the case is such that it has been brought to trial and we have the jury, and I do not feel at this time as if I ought to stop the trial of the case. Perhaps it would have been better if this had been filed at the beginning, I can not say; but the whole matter has been in a state of preparation for some time by counsel on both sides, and I think the court will allow it to be filed in this action over the objection of the defendant.

Mr. JACOBS: We desire a recess at this time in order to prepare a showing for a continuance in this case. I want to prepare an affidavit and motion for continuance at this time.

Jury admonished and recess taken to 11:15 o'clock A. M.

After Recess.

Roll call of jury. All present.

The COURT: It seems that counsel requires fifteen minutes more time which will bring it up to about twelve o'clock, in order to finish, which will be granted at this time.

Jury admonished and recess taken to 1:30 P. M.

After Recess.

Call of jury. All present.

84 Mr. JACOBS: Now this affidavit, if the court please. First we have a motion—affidavit and motion for a continuance. The motion reads: (Reads motion). The affidavit is in this language: (Reads affidavit). Now, as stated this morning, we feel that we should not be forced at this time to go into items involved in this counterclaim and cross-complaint, and the defendant requests a continuance at the costs of the plaintiff.

Mr. NAVE: You can dismiss it without prejudice, and the records may so show.

Mr. JACOBS: I can't dismiss this counter-claim at this time.

Colloquy between court and counsel.

The COURT: The court doesn't feel that it ought to grant that at this stage of the proceeding. The situation, as I said before, is such that matters of this kind should have been known to both parties beforehand, and the court will deny the motion.

Mr. JACOBS: We would like the records to show that we reserve an exception to your Honor's ruling.

The COURT: Very well, let the record so show Mr. Reporter.

Mr. CLEVE W. VAN DYKE, defendant, recalled, having been previously sworn, testified as follows:

Cross-examination.

By Mr. NAVE:

Question. Have you any reason to change any of the testimony you gave yesterday, Mr. Van Dyke?

85 Answer. No, sir.

Counsel for defendant objects to question as irrelevant and immaterial. Question answered before the objection.

Objection sustained.

Question. Now on yesterday, Mr. Van Dyke, you testified that the note's provisions in the note or paper you signed with respect to the two thousand dollars that was first handed to you by Mr. Hoveland from the Live Oak Company's funds, that the provisions in that note were in there because Mr. Hoveland contemplated that when the company—The Cordova Copper Company when organized should reimburse the Live Oak Copper Company therefor and should go ahead with that agreement made in exhibit A here. Is that correct?

Answer. That is my understanding.

Question. Then the two thousand dollars applied to no other advance? That was the understanding all the way through. What I mean is the matter stipulating that the payment applied only to that first two thousand dollars?

Answer. That was the understanding that night. Then Mr. Hoveland was called to New York and in the meantime this payment of five thousand came due, so I wired Mr. Hoveland in New York concerning it asking him what arrangement he had made to make the payment, and he wired back he would instruct Mr. McCarthy, who was his manager in Globe, to make the payment in my behalf.

86 Question. The next advance of five thousand?

Answer. That is the five thousand I am talking about in that telegram.

Question. That advance of five thousand on the telegram was made under this agreement in exhibit A?

Answer. I don't know what exhibit A is. You mean the contract?

Question. (Shows exhibit A to witness) This five thousand dollars was advanced under this agreement, exhibit A?

Answer. That was in accordance with the agreement at that time.

Question. There was no fixed time with respect to the five thousand dollars other than fixed by that paper. Is that correct?

Answer. Yes, sir. This money was to be used for assessment work, which they were to pay for.

Question. Now, the first note you refer to is this, is it not Mr. Van Dyke? (hands note to witness).

Answer. Well, now all I can say about it is that I never saw this but a few seconds when I signed my name. I can say it is my signature; that I believe this to be the voucher I signed.

Question. Well, you didn't sign it without reading it, did you?

Answer. Well, now as I remember this I signed a note at that time for two thousand dollars; that is the way I remember it; and this seems to be the voucher.

87 Question. That is your signature?

Answer. Yes, sir.

Question. Then you did sign it?

Answer. That is my signature; yes, sir.

Question. You didn't sign any other paper like that?

Answer. Well, now there were several vouchers sent to me in Arizona afterwards that I signed. This was three years ago and I have signed a good many documents since that time. If my memory serves me correctly, on that night, at that time, I signed a note; that is the way I remember it, for two thousand dollars due and payable to the Live Oak Copper Company; that is the way I recollect it.

Question. Can you not say you signed that at that time?

Answer. I can't say whether I did or not. I remember vouchers were sent me to Arizona.

Question. You didn't compare all the items? This represents the same items?

Answer. Yes, sir.

Question. That is your signature?

Answer. Yes, sir.

Mr. NAVE: We offer the paper in evidence if the court please.

Mr. JACOBS: I object at this time until I have had an opportunity to examine Mr. Van Dyke as to the competency of that writing in ink before it is entered in evidence.

Mr. NAVE: Until I have completed my examination it is not in order for Mr. Jacobs to cross-examine him on voir dire. The
88 examination is simply out of order. I will withdraw the offer.

Answer. I don't recollect anything that I signed—I don't recollect this explanation being written in.

Mr. JACOBS:

Question. Now, Mr. Van Dyke, did you read this document that bears your signature at the time, the date there given in the document, January 25th, 1909, do you remember?

Answer. It has been so long ago. The way I remember this is I remember signing a note, what I understood to be a note for two

thousand dollars payable to the Live Oak Copper Company sometime the following May; that is the way I remember it. I remember later on Mr. Smith—Harvey Page Smith, Secretary for this company—sent me a number of vouchers to Arizona which he requested me to sign. This was long after I received the money. I signed certain vouchers but I don't recollect signing a voucher with this writing on it.

Mr. JACOBS: You have no recollection of that?

Answer. No, sir.

Mr. JACOBS: We object to it upon the ground that it is irrelevant and immaterial and there is no proof that it contained the memorandum at the time of his signature.

Mr. NAVE:

Question. Do you mean to intimate you signed a blank voucher?

Answer. I didn't say I signed a blank voucher, no, sir.

89 I told you what my position is as I remember it. I signed a note——

Question. Did you say you signed that?

Answer. That is my signature, yes sir.

Question. Was that blank when you signed it?

Answer. Well, the way——

Question. Just a moment. Now you are a business man, Mr. Van Dyke?

Answer. Yes, sir.

Question. And an experienced man?

Answer. Yes, sir.

Question. And an educated man?

Answer. Yes, sir. The point I wish to make on that is I am not positive. I don't ever recollect signing a voucher having this written portion on it.

Question. Was it blank?

Answer. No, sir, it could not have been blank. This portion down here must have been written. I don't recollect having this portion in the middle when I signed it.

Mr. NAVE: May it be marked for identification, your Honor?

The COURT: Let it be marked plaintiff's exhibit one for identification.

Question. Why wasn't this contract signed?

Answer. Mr. Hoveland was supposed to come down to Arizona and look over the property. There were several points he wanted to determine.

Question. Why didn't you sign it to indicate your intention to be bound by it?

90 Answer. I was not here.

Question. Why didn't you do it later? Why haven't you ever signed it?

Answer. Because Mr. Hoveland when he came to Arizona on this first trip I didn't meet him, I was absent, I was in Tucson and he was here, and by the time I got back he had returned to Duluth. I

had urged frequently my desire to sign it to his partner, Mr. Smith, who was here on the ground all the time. I made many demands to have the contract signed, and he told me that——

Mr. NAVE: Never mind what he told you. I object to that as heresay.

The COURT: It is all right.

Question. Mr. Van Dyke, why then, to show your good faith, didn't you sign it even if you didn't get Mr. Smith or Mr. Hoveland to sign it?

Answer. They didn't give me an opportunity.

Question. You wanted to but they didn't give you an opportunity?

Answer. Yes, sir, they didn't give me an opportunity. There was no doubt in my mind——

Question. You weren't acting in relations to where the Statute of Frauds says you can't be held as long as your signature is not upon that paper?

Answer. No, sir.

Counsel for defendant objects to the question upon the ground that it is irrelevant and immaterial. Question answered before the objection is interposed. Objection not urged.

91 Question. You know now?

Answer. I have learned since.

Question. You haven't ever signed it since?

Answer. No. No demand has been made upon me.

Question. You had a demand to convey the mineral rights over to me did you not?

Answer. Yes, you made it.

Question. You haven't conveyed them?

Answer. No, sir, the conditions have not been fulfilled under my contract.

Question. Mr. Van Dyke you stated yesterday that this contract was written before you went to Duluth?

Answer. Yes, sir.

Question. No matter covering this contract was written while in Duluth?

Answer. No, sir.

Question. None at all?

Answer. No, sir. You see his trip to New York came up suddenly——

Mr. NAVE: Now Mr. Van Dyke just a moment. You have broken the record by answering "no." Let it go at that.

Mr. JACOBS: If the court please, I object to counsel's remark as being improper before this jury.

The COURT: Confine yourselves to the trial of this case, gentlemen.

Question. Now, Mr. Van Dyke, if you didn't owe this money why did you pay back some twenty-five hundred dollars?

Counsel for defendant objects on the ground that there is
92 no evidence showing that he did pay it back. Question withdrawn.

Question. You did pay some twenty-five hundred dollars to The Cordova Copper Company?

Answer. I paid more than twenty-five hundred dollars to the Cordova Copper Co. I had a running account with the Cordova Copper Company. I got some cash items from them sometimes and they got some cash items from me. Mr. McCarthy, would come to me and say: "We are 'hard up' for money for our payroll, Van, you have got to dig up some money. We have got to have it right away." I would do the best I could to get him the money. Our relations were very friendly.

Question. That don't get back to the fact that you paid twenty-five hundred dollars in——?

Answer. I didn't regard that I paid this in, I objected on different occasions. They kept drawing on me at different times for different amounts. Five thousand was paid to him at one time.

Question. You didn't owe as much as five thousand dollars to the Cordova Copper Company?

Answer. No. I discussed that situation with Mr. McCarthy at the time and I said I didn't owe it. I said——

Question. Didn't you tell him to apply it on their accounts, on your account?

Answer. I told him he could take this money and I would
93 settle it with Mr. Hoveland when I got an opportunity to talk it over with him. I was out of town when he got the money. I had this money coming and I arranged so he could go and get it because of his great need.

Question. Then when we applied part of that money on your debt to us what did you say should have been done with it?

Answer. Simply charge it against my account.

Counsel for defendant objects to the question on the ground that it is calling for an opinion of the witness. Objection not urged. Question answered before the objection.

Question. What did you intend we should do with it?

Answer. That is it. They included six or seven thousand dollars that was sent there for the Miami Townsite Co.

Question. You didn't intend it to be applied on that account?

Answer. No, sir, I did not. That was done under my protest.

Question. That was applied to this under your protest; and to whom did you protest?

Answer. Mr. McCarthy and Mr. Smith both, vehemently, at the time and several times afterwards.

Question. Now if you are not mistaken with respect to the matter of the five thousand dollars being subject to the same interest and date of payment, will you explain to me why you signed that voucher? (Hands voucher to witness.)

94 Answer. Well, as I remember, this voucher was sent to me after I came back to Arizona, with a request that I sign it. I don't recollect this portion though.

Question. You think that was forged over your signature?

Answer. I don't recollect——

Question. Was it blank when you signed it?

Answer. I don't recollect it absolutely.

Question. Are you in the habit of signin- papers without reading them?

Answer. I don't recollect that being there at the time.

Question. If it was it represented facts did it not?

Answer. It would represent this phase of the truth——

Counsel for defendant objects to the contents of the document being read.

Objection sustained.

Question. Go ahead and answer the question?

Counsel for defendant objects to the witness reading the contents of the document if the document is the best evidence and not introduced.

Objection sustained.

Question read.

Question. You can say yes or no to that.

Counsel for defendant renews his objection to what the document statements will be unless it is introduced in evidence. And on the further ground that it is irrelevant and immaterial.

95 Objection overruled, the court remarking: He can testify whether it represents the truth or not.

Answer. This seven thousand dollars of which——

Mr. JACOBS: He is testifying to the contents of that document.

Question. Answer my question.

Question read.

Answer. I can't answer that yes or no.

Mr. JACOBS: I would like to look at that document so I can make my objection.

The COURT: Very well.

Question. Go ahead?

Answer. This seven thousand dollars that was advanced prior to the time of his trip to Arizona and this represents the voucher prior to that time when he had these conditions that he wanted to satisfy himself about.

Question. Well then——?

Answer. And this voucher was sent in the meantime until he came down to look this thing over.

Question. When you said that the provision that applied to the two thousand dollar payment didn't apply to the five thousand dollars you were mistaken?

Answer. I did not quite get your question?

Question. You said the interest and date of payment which you embodied in your note for two thousand dollars did not apply to the five thousand dollars?

Answer. Yes.

96 Question. Then when you said that you were mistaken?

Answer. I said that was true of the note. It was understood all the time these should bear six per cent. interest.

Mr. NAVE: We offer it in evidence.

The COURT: Let it be received and marked plaintiff's exhibit B in evidence.

(Mr. Nave reads exhibit B to the jury.)

Question. Now when you said a while ago that a fixed time of payment and a fixed rate of interest for you to pay applied only to the two thousand dollars you were mistaken?

Answer. I didn't say that.

Question. Now, Mr. Van Dyke, when the next item of ten thousand dollars was paid it was paid on that draft was it not? (Hands draft to witness). Yes, sir, I remember we drew on the Gila Valley Bank.

Question. That is your signature?

Answer. Yes, sir, drawn through the Gila Valley Bank.

Question. You authorized the Cordova Copper Company to charge that to your account by that draft?

Answer. I drew this subject to a telegram from Mr. ——

Question. I am asking you whether you drew it to charge to your account. That is what it says is it not?

Answer. Yes, sir.

Question. That is what you intended?

97 Answer. Drawn on my account to make this payment according to our contract.

Mr. NAVE: I offer the paper in evidence.

Mr. JACOBS: No objection.

The COURT: Let it be received in evidence and marked plaintiff's exhibit C.

Exhibit C shown to the jury by Mr. Nave.

Question. Now, when Hoveland sent you that ten thousand dollars you refused to sign it didn't you?

Answer. I don't recollect. As I remember this voucher was sent me after Mr. Hoveland had visited down here, but I don't recollect whether I refused to sign the voucher or not. He had been down here in May and gone back, and he was supposed to have looked over conditions and let me know whether he wanted to continue the contract or not.

Question. Just glance at that. You don't need to read it because it is very long. Say if that is your letter? (Hands letter to witness).

Answer. Yes, sir, that is my writing so far as I can see.

Question. Just glance through it to see that we haven't put in any sheet that doesn't belong there?

Answer. (Witness reads letter.) Yes, that is my letter.

Mr. JACOBS: What is the date of that please?

Answer: May 28th.

Mr. JACOBS:

Question. 1909?

98 Answer. Yes, sir. That was after Mr. Hoveland came down here and viewed the situation.

Question. Very well, Mr. Van Dyke, now I ask you if on May the 28th, 1909, you didn't write to Mr. Hoveland "When in Duluth I had a tentative contract drawn along the line we discussed?"

Counsel for defendant objects on the ground that it is not the best evidence.

Objection overruled.

Answer. I wrote that in conjunction with other contents there which will explain the real situation.

Question. You wrote that, however.

Answer. Yes, sir.

Question. Did you not also write him, I think on the same date "I believe I left a copy with you, but as you may not have it I will send you the original copy"?

Answer. Yes, sir.

Question. Did you enclose that with this letter?

Answer. I don't recollect. I presume I did if it states so.

Question. And you said "I will send you the original copy"? You offered to sign it then or later?

Answer. I have the impression that I signed a copy at that time at Mr. Smith's suggestion.

Question. And this notation on this paper is your hand-

99 writing? (Hands paper to witness to examine.)

Answer. Yes, sir.

Question. That is the paper you enclosed to Mr. Hoveland with the letter I just showed you?

Answer. I don't recollect whether *is it* or not.

Question. Did you not say—By the way this paper is a copy isn't it?

Answer. An identical copy.

Question. An identical copy of exhibit A isn't it?

Answer. I think it is.

Question. And it is an identical copy of the contract set up in your answer isn't it?

Answer. With the exception of the notation.

Question. With the exception of the handwriting on this margin?

Answer. Yes, sir. Let me see what that is.

Question. That which is written on here in yours?

Answer. Yes, sir, written there at the suggestion of Mr. Smith.

Mr. NAVE: I offer the paper in evidence.

Mr. JACOBS: No objection.

The COURT: Let it be received and marked plaintiff's exhibit D in evidence.

100 (Mr. Nave reads the notation on exhibit D to the jury and hands the exhibit to the jury for examination.)

Question. Now, Mr. Van Dyke, when you testified that contract precisely as it lay was the agreement you had with Mr. Hoveland in Duluth you were mistaken?

Answer. No, sir.

Question. Then why did you write on the margin that the percentage would not apply to the Cordova?

Answer. It wasn't determined at Duluth at that time exactly what size company should be organized. It was thought at that time that my ground and the Eureka Group would form a small company. After leaving Duluth, Mr. Hoveland, in arranging for the new company, included the old Globe Consolidated. The old Globe Consolidated was organized, as I remember it, at a million and a half dollars, and he included this with our property and increased the capitalization considerably because of that. In discussing that phase of it with Mr. Smith he thought I ought to modify my agreement to that extent.

Question. Then your agreement wasn't that you should have fifteen per cent. of the Cordova?

Answer. Yes, sir, at that time.

Question. It isn't now?

Answer. Yes, sir. I was willing to make that modification if they accepted it, but they didn't.

Question. That is all the explanation you care to give of it?

Answer. That is the conditions that prevailed.

Question. You have already stated that you said in this letter——

Counsel for defendant objects to what he said in the letter on the ground that the letter is the best evidence.

Question. You have already stated you said in the letter

101 "When in Duluth I had——"?

Answer. If you will read the rest of the letter you will find that is the contract. What I meant by a tentative contract, was that it wasn't a contract ready to be signed.

Question. Then when you said here you mean tentative, what did you mean by tentative? When you wrote him that in the letter what did you mean by tentative?

Answer. I meant by tentative that the contract wasn't fully completed at that time.

Question. Then why did you say that was everything?

Answer. I meant it was tentative because Mr. Hoveland at that time had not the opportunity to see the property or a complete and definitely surveyed map of the ground to find out whether or not it was close up to the Eureka Group which he was purchasing.

Question. Not tentative as to percentage?

Answer. No, sir.

Question. Not tentative as to the taking of preferred stock?

Answer. No, sir.

Question. That was fixed was it?
Answer. That was my understanding.
Question. But you said "In Duluth I had a contract drawn"——

Counsel for defendant objects. Objection not urged.

Question. You have stated in your letter that you had it drawn in Duluth. Did you have it drawn in Duluth?
102 Answer. No, sir, before I went to Duluth.
Question. Why, then, did you say here that you had it drawn in Duluth?

Counsel for defendant objects to him trying to put in evidence a written document which he will not offer in evidence.
The COURT: What is the avowal?

Question. Then when you said you had it drawn in Duluth you didn't mean that?
Answer. I meant what I said.
Question. Now, sir, I will ask you whether in your letter to Mr. Hoveland of May 28, 1909, you didn't say "All money advanced for the Townsite Company would be returned at six per cent. interest." Did you say that? Yes or no?

Mr. JACOBS: I object to the question upon the ground that it is attempting to get in evidence a portion of a written document and the document itself is the best evidence, and I would like an opportunity to inspect the document before the witness has answered the question. I would also like to have the letter offered in evidence.
The COURT: Offer it, Judge Nave.
Mr. NAVE: I am not trying to prove the contents of this letter, I am laying the foundation to impeachment. He has testified to things which in my opinion are contrary to those which he has written.
The COURT: Very well. The objection will be overruled.
103 Counsel for defendant excepts to the ruling of the court.
Question read.

Question. Well, did you say this?
Answer. I said just as written there, yes, sir.
Question. Just as read?
Answer. It—That is supposed to be the six per cent. interest on the accumulative dividends.
Question. I will ask you whether in the same letter you did not say your security for same would be either preferred stock, which is redeemable in real estate guaranteed by the company to be taken up before any dividends were paid, or could be handled by the townsite company issuing notes?

Counsel for defendant objects to the question upon the ground that the letter is the best evidence.
Objection overruled. To which ruling of the court counsel for defendant reserves an exception.

Question. Did you write that to him?

Answer. Yes, sir.
Question. Now I believe you have said this is your letter?
Answer. Yes, sir.

Mr. NAVE: I offer the letter in evidence.
Mr. JACOBS: No objection.
The COURT: It may be received and marked plaintiff's
104 exhibit E in evidence.
Jury admonished and recess taken for ten minutes.

After recess. Roll call of jury. All present.

Exhibit E read to the jury by Mr. Nave.

Question. This is one of your letters Mr. Van Dyke? (Hands letter to witness.)
Answer. You want me to read it?
Question. No; you need not read it. Your attorney will read it before it is read to the jury, of course. Just see whether it is one of your letters?
Answer. (Witness reads letter.)
Q. Is that your letter, Mr. Van Dyke?
A. Yes, sir.

Mr. NAVE: We offer it in evidence.
Mr. JACOBS: We object upon the ground that it is irrelevant and immaterial, and does not tend to prove or disprove any of the issues in the case.
Mr. NAVE: Very well. I will withdraw it.
Mr. NAVE: I now offer in evidence this letter of July 1st, which the witness has identified.
Mr. JACOBS: We object upon the ground that it is irrelevant, immaterial and incompetent.
Mr. NAVE: Very well, I shall not press the offer. I now call upon you to produce the original letter from Mr. Hoveland to Mr. Van Dyke dated August 19, 1909. (Hands copy of letter to Mr. Jacobs.)
105 Mr. JACOBS: Is this a copy of it?
Mr. NAVE: That is a copy.
Mr. JACOBS: I think I have that, but I must have left it in my office.
Mr. NAVE: Very well, then, if you have no objection I will offer the copy.

Mr. JACOBS (to witness Van Dyke): That is a copy of it is it not?
A. I think so.

Mr. JACOBS: Let that go in, we will not object to that.
The COURT: It may be received and marked plaintiff's exhibit F.
Mr. Nave reads exhibit F to the jury.

Q. Now your reply to that letter was this, was it not, Mr. Van Dyke? (Hands letter to witness.)

Mr. JACOBS: Is that the letter of August 19th?

A. Yes.
Q. Now, Mr. Van Dyke, will you answer my question?
A. What was the question?
Question read.
A. Yes, sir.

Mr. NAVE: We offer letter dated August 24th, in evidence.
Mr. JACOBS: No objection.
The COURT: It may be received in evidence and marked
106 plaintiff's exhibit G.
Exhibit G read to the jury by Mr. Nave.
Mr. NAVE: Now I will ask you to produce the original of this letter, if you please, sir. (Hands carbon of letter to Mr. Jacobs.)
Mr. JACOBS: I presume that was signed by H. B. Hoveland?
Mr. NAVE: Yes, sir.
Mr. JACOBS: No objection to that
Mr. NAVE: Have you any objection to the fact that it is a copy?
Mr. JACOBS: No, sir.
Mr. NAVE: We offer the letter in evidence. Letter of November 6th, 1909.
The COURT: Let it be received and marked plaintiff's exhibit H in evidence.
Exhibit H read to the jury by Mr. Nave.

Q. Is this your reply to that letter? (Hands letter to witness.)

Mr. JACOBS: Is that dated November 6th?
Mr. NAVE: Dated November 6th, yes.

A. Yes.

Mr. NAVE: I offer it in evidence.
Mr. JACOBS: No objection.
The COURT: Let it be received and marked plaintiff's exhibit I in evidence.
107 Mr. Nave reads exhibit I to the jury.

Q. Is that your letter?
A. Yes, sir.

Mr. NAVE: I offer it in evidence. Letter dated November 11th, 1909.
The COURT: It may be received and marked plaintiff's exhibit J in evidence.
Mr. Nave reads exhibit J to the jury.
Mr. NAVE: I will ask you for the original of this letter (Hands carbon of letter to Mr. Jacobs). If you don't care to look for the originals let us put the copies in.
Mr. JACOBS: Were those signed by Hoveland and Smith?
Mr. NAVE: Yes.
Mr. JACOBS: Let those all go in together.
Mr. NAVE: I offer three letters as one exhibit: Letter of February 8th, letter of March 3rd, and letter of May 8th, 19— signed by Harvey P. Smith and addressed to Cleve W. Van Dyke.

The COURT: Let them be received and marked plaintiff's exhibit K in evidence.

Q. Now, Mr. Van Dyke, one more question: You didn't—Have you talked over your proposition with respect to advancing of money for your townsite scheme with several officers of the company, one of whom was Mr. Hoveland?

A. When do you mean?

108 Q. Any time. I don't think you fixed the time. About the time. Before the time the first two thousand dollars was paid in Duluth you talked it over with Mr. Hoveland?

A. Yes, sir.

Q. Prior to that?

A. Prior to that in December, here, about the time the contract was made for the option on the Eureka Group I talked it over with Mr. Fairchild, Secretary of the Cordova Copper Company. I remember discussing it one time with Mr. Burrows and Mr. Fairchild As I remember it they introduced the subject; that is, made a general tender to me for property; that I purchase some property if I could get it.

Q. And you stated to them what your plan was with respect to advancing money and its reimbursement?

A. I don't recollect. At that time the plan had become evolved, and as near as I can remember he made the general offer.

Q. In one of those letters you will observe—I don't recollect which—to Mr. Hoveland, you say the agreement you sent him last Spring was drawn last December?

A. This agreement had nothing to do with the preliminary offer made in Globe.

Q. You say this other proposition has nothing to do with

109 your agreement—with your townsite agreement?

A. No, sir, entirely different date.

Q. That is the paper in evidence?

A. It refers to something else. I don't believe I ever referred to that. Mr. Fairchild's deal was left in the hands of Mr. Hoval Smith when he left here. That was the way I understood it.

Jury admonished and recess taken until 9:30 A. M. May 1st, 1912.

After recess. Roll call of jury. All present.

Q. Now, Mr. Van Dyke, I was going to ask you as we left last night with respect to your statement in your letter that the form of contract you sent Mr. Hoveland was drawn in December. I called your attention to that statement in your letter of November 11th?

Question read at request of Mr. Jacobs.

A. Judge I think that is a mistake in the letter, because I don't believe the contract was drawn in December. I think it was drawn in January. The reason I think that was because it was drawn in Warren, Arizona, Warren or Bisbee.

Direct examination.

By Mr. JACOBS:

Q. Mr. Van Dyke I call your attention to plaintiff's ex-
110 hibit A, being a copy of the contract that is set forth in your amended answer in this action—I call your attention to the heading of this agreement "made this eighteenth day of January, 1909 between Cleve W. Van Dyke and Hoval A. Smith." Explain to the jury, if you please, how the name of Hoval A. Smith appears on the contract?

A. The option on this Cordova deal, which included the Eureka property, was being taken in Mr. Hoval A. Smith's name at that time. It was being taken in his name and everything was to be assigned to him.

Q. What was the relation of Hoval A. Smith and Henry B. Hoveland at that time?

A. Partners.

111 Question. In this transaction?

Answer. Yes, sir.

Question. In the Cordova and Eureka?

Answer. Yes, sir.

Question. Partners in the Globe Consolidated, Warrior Development Company, Live Oak Development Company and the various mining interests of Henry B. Hoveland in this vicinity?

Answer. Yes, sir.

Counsel for plaintiff objects to the question as to whether or not the gentlemen were partners in various enterprises. Answer given before objection interposed.

Objection sustained except as to property in controversy.

Question. Now about when did you leave Arizona for Duluth, Minnesota to interview Mr. Hoveland with reference to this transaction?

Answer. Well, now, I don't recollect the exact date, but it was along about the middle of January sometime in 1909.

Question. Of 1909?

Answer. Of 1909, yes, sir.

Question. After this contract was drawn?

Answer. Yes, sir, directly after it was drawn.

Question. This contract, you will notice, is dated the eighteenth of January?

Answer. Yes, sir.

Question. You say almost immediately after that?

Answer. That is my recollection, although I can't recollect the exact date.

112 Question. Where was that contract drawn?

Answer. Warren, Arizona, written up in Mr. Hoveland's law office.

Question. By one of his attorneys? Mr. Alderman?

Answer. That is typewritten by one of his stenographers.

Question. Typewritten by one of his stenographers and dictated by one of his attorneys?

Answer. Yes, sir. I supplied the notes and the terms.

Question. That is the terms and conditions of the agreement?

Answer. Yes, sir, and you will find on that copy interlineations and corrections in their attorney's handwriting.

Question. Exhibit A?

Answer. Yes, sir.

Question. Where are those interlineations you speak of? Just enumerate the pages on which the handwriting of Mr. Alderman, attorney for Henry B. Hoveland, appears?

Answer. On the second page corrections made, on the third page and on the first page.

Question. On the second and first?

Answer. Some corrections made on page one. For instance, here, "price for" interlined on page one and word changed from "properly" to "rapidly."

Question. That is in the handwriting of the attorney for Mr. Hoveland?

113 Answer. Yes, sir. Word "bill" correct, and after here words "before in July."

Question. That is on page two?

Answer. Yes, sir.

Question. That is in the handwriting of Mr. Alderman, who was then attorney for Mr. Hoveland?

Answer. Yes, sir. On page three the word "they" corrected to the word "there."

Question. This is all done by Mr. Alderman?

Answer. Yes, sir.

Question. Now when you arrived in Duluth you had a business engagement with another party in reference to the sale of these mineral rights did you not?

Answer. Yes, sir.

Question. You know a man named Dwight Woodridge?

Answer. Yes, sir.

Question. Was he in Duluth at that time?

Answer. Yes, sir.

Question. You were negotiating with him at that time for the sale of these mineral rights were you not?

By Mr. NAVE: Counsel for plaintiff objects to the question upon the ground that it is immaterial.

Answer given before the objection was made.

Objection sustained. To which ruling of the court counsel for defendant reserved an exception.

Question. How long after you arrived in Duluth before you saw Mr. Henry B. Hoveland?

114 Answer. I don't remember whether I saw him that evening or the next morning.

Question. You met him in his place of business, in his office?

Answer. No, I believe it was at the hotel.

Question. And you discussed this property deal with him in reference to the mineral rights of this Miami Townsite Company?

Answer. Yes, sir.

Question. You showed him a copy of that contract?

Answer. Yes, sir.

Question. How long was this proposition under discussion by you and Mr. Hoveland?

Answer. We were around discussing it off and on at different interviews for a couple of days—two or three days.

Question. You met him at different times?

Answer. Yes. He invited me out to his house. I was with him there. He stayed at a house named T——. I was with him all night there and we s-ayed up late at night discussing it. Other matters were discussed, but we discussed that.

Question. And at the conclusion of your discussion these two thousand dollars were paid to you by Mr. Hoveland were they?

Answer. Yes, sir.

Question. Now that appears to have been paid to you out of the funds of the Live Oak Development Company. Is that correct?

Answer. Yes, sir.

115 Question. Will you explain to the jury how that happened that you received that two thousand dollars out of the funds belonging to the Live Oak Development Company?

Answer. The new company about to be organized——

Question. What company? Mining company or Townsite Company?

Counsel for plaintiff objects to the question upon the ground that it calls for a conclusion of the witness; that it calls for the opinion of the witness.

Question withdrawn.

Question. State, Mr. Van Dyke, what, if anything, Mr. Hoveland told you at that time about paying you this two thousand dollars out of the funds of the Live Oak Development Company?

Answer. He stated that they were the only funds he had available at that time, and in discussing it said that he felt he was justified in using these funds because of the benefit our company would be able to give the Live Oak Company in the way of placing houses there, and as soon as our new company was organized they could take this phase over.

Question. Now what company did he refer to?

Answer. The company at that time was not named. The name placed on it afterwards was the Cordova Mining Company, the Cordova Copper Company.

Question. That is the mining company he referred to?

116 Answer. Yes, sir.

Question. Proposed the organization of that mining company to handle that property?

Answer. Yes, sir.

Question. As soon as they could organize and they had funds available they would take this note over and pay off the obligation to the Live Oak Development Company?

Answer. Yes, sir.

Question. So you received this two thousand dollars out of the funds of the Live Oak Development Company?

Answer. Yes, sir.

Question. Now, at your various interviews with Mr. Hoveland in Duluth on that occasion you had this contract there?

Answer. I don't know as I had that there——

Question. I mean a copy or the original?

Answer. Yes, sir.

Question. In the same language as this exhibit A?

Answer. Absolutely, together with interlineations, corrections as made there by the attorney for Mr. Hoveland.

Question. You discussed all of its various terms and conditions with Mr. Hoveland?

Answer. Yes, sir.

Question. Did Mr. Hoveland make any objection to any of those conditions or terms? Did he say he would not accept them or adopt them?

117 Answer. He did not say he would not accept them, no, sir.

Question. When was this two thousand dollars paid to you? After you had discussed this contract with Mr. Hoveland?

Answer. Yes, sir; that was the last thing done. He paid me two thousand dollars and said good bye and got on the train that night and went to New York.

Question. How many copies of that contract did you have with you in Duluth?

Answer. I don't remember.

Question. What, if anything, was said by you to Mr. Hoveland in reference to signing the contract under those terms and conditions?

Answer. He stated that he wasn't prepared to sign it at that time for two reasons. First, he did not have time—he was called away hurriedly to New York on important business, and second, there were some things he wanted to verify in his own mind: He wanted to look over the ground first and wanted to see a map.

Question. Was those the things he wanted to verify?

Answer. Yes, sir, he wanted to know whether or not the ground I represented was connected up with the Eureka Group.

Question. That is the Eureka Group, property, you spoke of before intended to be included in this Cordova Copper Company?

Answer. Yes, sir.

Question. Now what, if you know, is the acreage of that Eureka property?

118 Answer. About 126 acres.

Question. What is the acreage of the property of the Miami Townsite Company, the mineral rights of which we proposed to convey to Mr. Hoveland?

Answer. About 285 acres.

Question. Eureka 175 acres?

Answer. 126 I think it was.

Question. And the Miami 285 acres?

Answer. As I remember it.

Question. Then, under that plan as discussed with Mr. Hoveland, you were to furnish the mineral in 285 acres and Hoveland was to furnish the mineral in 126 acres?

Answer. Yes, sir.

Question. Was anything said at that time about including the property of the Globe Consolidated in this Cordova deal?

Answer. No, sir, there was not.

Question. Then all that was proposed to be included was this Eureka acreage and Miami?

Answer. How was that again?

Question. All the property that was to be included in this new corporation and operated by them was the 126 acres of the Eureka Group and the 285 acres of the Miami Townsite land?

Answer. Well, now, that was the way I recollect it. It seems to me at the time though, that after quite a lengthy consideration, that possibly the Live Oak might be included in that and make one mining company.

Question. But there wasn't anything said at that time about the Globe Consolidated stock holders being included owing to the
119 depreciation of the value of that stock, the company having failed to develop a mine after expending a large sum of money — of a million dollars, and wanting to pacify and smooth over the Globe Consolidated stock holders, by taking them into this deal and giving them stock? Was that discussed?

Answer. No, sir, it was not discussed with me.

Question. They subsequently did take this Globe Consolidated property in did they not?

Answer. Yes, sir.

Question. This contract, Exhibit A, set up in your answer refers to other mining property?

Answer. Yes, sir.

Question. The Eureka property and the Miami townsite property and other property, such other property as Mr. Hoveland might see fit to include?

Answer. Yes, sir.

Question. That was the Live Oak property?

Answer. They had under consideration at the time picking up some other claims that were not included in my group of the two Sho Me claims and the Myrtle claim. I was instructed to go ahead at that time and try to secure an option on the Sho Me No. 1 and No. 2 and to the Myrtle claim, which I did.

Question. With a view to subsequently putting them in this corporation?

120 Answer. Yes, sir. I secured those options. The option on the Show Me from Van Slyck and the option on the Myrtle from Mr. Davis for this purpose.

Question. Was Mr. Dwight Woodridge there at that time?

Answer. Yes, sir.

Question. Was he present at any of these conversations?

Answer. I think he came into the room for a few moments one afternoon; came in I believe and brought in a box of cigars and we all had a smoke. I saw Mr. Fairchild off and on. I was in his office and talked to him before this talk——

Question. Met him on the street did you?

Answer. On the way up to see Mr. Hoveland and he took me to his house on the street car——

Question. Was Mr. Dwight Woodridge there at that time?

Answer. With Mr. Dwight Woodridge on the street car, yes, sir.

Question. You have read this exhibit E, letter of May 28th. Can you find that portion of the letter which refers to contract which you testified is a copy of exhibit A referred to here?

Answer. Yes, sir, it is on page seven.

Question. "I shall send you a copy of my contract as you request." Is that what you mean?

Answer. Yes, sir.

121 Question. "When in Duluth I had a tentative contract drawn along the lines we discussed I believe I left a copy with you, but as you may not have it I will send you a copy."

A. Yes.

Q. "If stocks and other considerations as mentioned in the contract." What contract do you mean? The one you discussed with Mr. Hoveland in Duluth?

A. Yes, sir.

Q. That was written in response to a letter of previous date received by you, was it not?

A. Yes, sir.

Q. And you sent him a copy of that contract—the original?

A. Yes, sir.

Q. What is the date of that letter?

A. May 28th.

Q. And that copy of that contract you sent him is the copy that is marked exhibit A introduced in evidence here, is it not?

A. Yes, sir.

Q. Presented to Mr. Hoveland?

A. Yes, sir.

Mr. NAVE: You are misleading the witness; that is not the one.

122 Q. Now in order to get the records straight, having made a mistake as to the letter exhibit on file, I will ask you: Is the copy of the contract that you sent to Mr. Hoveland mentioned in your letter of May 28th, to Mr. Hoveland is the contract filed in this case and marked plaintiff's exhibit D?

A. Yes, that is the one.

Q. I call your attention to the interlineations on pages one, two and three of the contract—interlineations and corrections in the body of the contract, and ask you in whose handwriting they are?

A. Mr. Alderman's.

Q. Attorney A. L. Alderman?

A. R. L. Alderman.

Q. Who was attorney for Mr. Hoveland at that time?

A. Yes, sir.

Q. So you sent this contract to Mr. Hoveland enclosing it in your letter of May 28th?

A. Yes, sir.

Q. Now, after you sent him that contract and before the 14th day of July, 1909, had Mr. Hoveland repudiated this agreement that you had submitted to him in Duluth and subsequently sent him on May 28th?

A. No, sir.

Counsel for plaintiff asks that answer be stricken from the record until he can interpose an objection.

123 Answer stricken for the purpose of allowing counsel to object to the question.

Counsel for plaintiff objects to the question upon the ground that it is calling for an opinion of the witness and not for a fact.

Objection sustained. Exception by defendant.

Q. Did you receive any communication from Mr. Hoveland in which he protested or objected to the terms or conditions of that contract before the 14th day of July?

Counsel for plaintiff objects to the question on the ground that it calls for the contents of a letter if there is such a letter, and calling for the opinion of the witness as to what the letter constitutes, if there is such a letter, and asks that if he received such letter that it be produced.

Objection sustained.

Mr. JACOBS: On what theory?

The COURT: That you are trying to get the contents of a letter.

Colloquy between court and counsel.

Q. You never did receive any letter from Mr. Hoveland about this contract?

A. No, sir.

Counsel for plaintiff objects to the question as calling for the opinion of the witness or the contents of a letter.

The COURT: The question has been answered.

124 Mr. NAVE: The objection was made before the answer.

The COURT: I will instruct the witness not to answer when counsel starts to object until he makes his objection.

Mr. JACOBS: I will withdraw the question.

Q. Now on the 14th day of July, 1909, I call your attention to that date, after you had sent him (Mr. Hoveland) this contract, the Cordova Copper Company, of which Mr. Hoveland is president, or was president at that time, paid you ten thousand dollars on that contract didn't they?

Counsel for plaintiff objects on the ground that the question calls for the opinion of the witness.

Question withdrawn.

Q. Now, I will ask that question again: After you had sent this

contract referred to in your letter of May 28th, to Mr. Hoveland you received from the Cordova Copper Company on the 14th day of July, 1909, after all these negotiations and after submitting the contract, you received this ten thousand dollars did you not?

Counsel for plaintiff objects to the question upon the ground that it is unquestionably settled (undisputably settled) by the pleadings and already answered.

Objection overruled.

A. Well, now, I don't recollect the exact date. I think along about the first part of July I did receive ten thousand dollars
125 from Mr. Hoveland according to——

Q. Now I call your attention to plaintiff's exhibit C, being a draft in the sum of ten thousand dollars. For what was that money paid you?

A. It was paid me on this contract.

Counsel for plaintiff moves that the answer be stricken as stating a conclusion of the witness and not responsive to the question.

Motion denied.

Q. I call your attention to plaintiff's exhibit one for identification, being a voucher for two thousand dollars from the Live Oak Development Company. For what was that money paid you?

Mr. NAVE: I object to that upon the ground that Mr. Jacobs prohibited me from putting that in evidence.

Mr. JACOBS: I will reframe that question.

Q. I call your attention to plaintiff's exhibit one for identification, previously submitted to you by judge Nave the attorney for the plaintiff in this case, and concerning which he questioned you, and ask you if you received that two thousand dollars represented in that voucher, and for what that money was paid you.

Mr. NAVE: Same objection.

The COURT: Ask him about the money and not the document.

Q. For what was that paid you?

126 Mr. NAVE: Now, if the court please, I object to that. He hasn't changed the question in the least.

Q. What is your answer.

Mr. NAVE: Same objection.

The COURT: It may be answered. Objection overruled.

A. I received two thousand dollars on this contract I made with them.

Q. Exhibit E? On this plaintiff's Exhibit E? (Might have said D) Is that the contract you refer to?

Counsel for plaintiff objects to the question as calling for the opinion of the witness upon a matter of law.

The COURT: I didn't quite understand the question.

Mr. JACOBS: I will withdraw the question.

Q. Now I call your attention to plaintiff's exhibit B in evidence,

being a voucher to the Cordova Copper Company signed by Cleve W. Van Dyke in the sum of five thousand dollars. For what did you receive that five thousand dollars?

A. On this contract.

Q. What contract do you refer to?

Mr. NAVE: I object to the question and move that the answer be stricken. I object upon the ground that it is the statement of a conclusion and not a fact.

Coloquy between counsel.

127 Mr. JACOBS: I object to the remark judge Nave made before this jury where he referred to this defendant's attorney stalling to kill time in this case, and I want the objection to appear on the record. It is prejudicial to the rights of this defendant and tends to bias and prejudice this jury against this defendant, and is for no other purpose than to poison the minds of the jury against Mr. Van Dyke and his attorney in this case.

The COURT: Let the records show that. He may answer the question. The objection will be overruled.

Question read.

A. This same contract that is on exhibit. Exhibit D (B).

Q. Now counsel has asked you if you refused to sign at the request of Mr. Hoveland or the Cordova Copper Company, a voucher similar to plaintiff's exhibit one for identification and plaintiff's exhibit B in evidence, a similar voucher. He has asked you if you refused to sign such a voucher?

A. I don't recollect definitely about that. My memory fails me on that. That would be the consistent thing to do under the conditions as developed. I presume I did.

Q. You would refuse would you?

A. Yes, sir.

Counsel for plaintiff objects to the answer as hypothetical.

128 Objection not urged.

Q. If you did refuse to sign it, why did you?

Counsel for plaintiff objects to the question upon the ground that it is hypothetical.

The COURT: There is not testimony that he did refuse. The objection will be sustained unless shown that he did refuse.

Exception by counsel for defendant.

Q. Now, on this exhibit D, on the margin, you have said something about the Cordova stock. I will have to read this in order to get at the point: "This is the form I had in mind when a small development company was considered. Of course, percentage would not apply to the Cordova, but that can be adjusted according to new conditions". Now what did you mean—What thought did you mean to convey to Mr. Hoveland——

Mr. NAVE: I object upon the ground——

Mr. JACOBS: I haven't finished my question, just wait a minute. What did you mean "This is the form I had in mind what a small development company was considered?

Mr. NAVE: I don't object to that.

A. In order to place that——
The COURT: Just answer his question.
A. This was mailed to Mr. Hoveland without this interlineation and his partner, Mr. Smith, was in Globe at the time and he
129 brought this question up to me and said——

Mr. NAVE: I object to what Mr. Smith stated as hearsay. I object to anything Mr. Smith said.
The COURT: It would be hearsay.

A. He called my attention to the fact that this latter company that was organized was organized with a larger capitalization than the other company——
Q. This company mentioned on exhibit D?
A. Yes, sir.
Q. And then?
A. Mr.——

Mr. NAVE: I permitted him to go that far. We have Mr. Smith here to answer him.
Colloquy between counsel.

Q. Getting down to this marginal note here, Mr. Van Dyke, why did you say to Mr. Hoveland on the margin of this contract "This is the form I had in mind when a small development company was considered, and, of course percentage would not apply to the Cordova, but that can be adjusted according to new conditions." Explain that?
A. I was willing because of the——
Q. Willing to what?
A. To change my contract with him on that point providing it was acceptable to him, because of the fact that this large Globe Consolidated had been included in this organization and the
130 capitalization was greater than we had anticipated in our original contract and that point had not been taken up with me at that time.
Q. You suggested it to him on that form?
A. Yes, sir.
Q. When you say percentage you mean what percentage?
A. My fifteen per cent of the total stock.
Q. Of the Cordova?
A. Of the Cordova, yes, sir.
Q. Now what, if anything, did Mr. Hoveland do concerning the change in the percentage of the stock?
A. He never accepted my suggestion.
Q. This suggestion here?
A. No, sir.
Q. And the matter stood as originally agreed?
A. Yes, sir, and afterwards paid something on it.
Q. How?
A. And afterwards paid the ten thousand dollars on it.

Mr. NAVE:

Q. Paid you that ten thousand dollars?
A. Yes, sir, on that original contract.
Q. At the time he paid you that ten thousand dollars on July 14th, 1909, Mr. Hoveland had that contract in his possession?
A. Yes, sir; also had fulfilled the conditions because of which we had left it open.

131 Q. What conditions?
A. He was coming down here and I was to supply him with a map. I did this in May, then he came down here and looked over the property and saw what the conditions were and went back to Duluth and paid me some ten thousand dollars in July.
Q. You say you supplied him with a map?
A. Yes, sir.
Q. Did he see it?
A. Yes, sir.
Q. Is that the map (Hands map to witness)?
A. That is a portion of a copy of the map. That is a map gotten up by Mr. Hoveland's engineers during the summer as additions to the original map sent to him.
Q. What land does this map represent?

Question objected to by counsel for plaintiff upon the ground that the map does not figure in the law suit.

Q. Is the other map like this?
A. This is a copy of the other map with additions put on it.

Mr. JACOBS: We offer it in evidence and will ask that it be marked defendant's Exhibit.

Mr. NAVE: Let it go in.

132 The COURT: Let it be received in evidence and marked defendant's exhibit A-1.

Question. Now at whose suggestion was this map made?
Answer. At the request of Mr. Henry B. Hoveland when we discussed our contract.
Question. In your conversation in Duluth he requested the map of you didn't he?
Answer. Yes, sir.
Mr. NAVE: That is not the map is it?
Answer. It includes the map drawn at that time at his request with the location of some new claims besides. This was prepared by his own engineers.
Question. Did you send that map to Mr. Hoveland?
Answer. I did, yes, sir. I telegraphed for the map and delivered it at his office personally.
Question. And this was made by the engineers of the Cordova Copper Company?
Answer. A copy of this map was drawn and this tracing made of it and additional claims located were placed upon that map. That is a copy of that original map with the addition of the new claims.
Question. I call your attention to the third paragraph of page

one of plaintiff's exhibit F in evidence, in which Mr. Hoveland stated to you in one letter in answer to yours of date of August 19th, 1909, "In one letter you raised the question as to why we should be interested in the sale of lots, but I believe you will concede that our interest is natural inasmuch as your plan proposed to repay
133 the money we advanced from the sale of real estate." Now what plan did he refer to?

Counsel for plaintiff objects to Mr. Van Dyke stating what Mr. Hoveland meant by that letter on the ground that the letter speaks for itself, and that the jury knows as much about what Mr. Hoveland meant by that letter as Mr. Van Dyke does.

Question withdrawn.

Question. Did you have more than one plan with Mr. Van Dyke as to the repayment of this money?

Answer. You mean with Mr. Hoveland?

Question. With Mr. Hoveland, yes?

Answer. Only one plan.

Question. What plan was that?

Answer. Out of the sale of real estate. The plan was this: That we have in our townsite corporation two kinds of stock, preferred stock and common stock. Preferred stock was to carry six per cent. accumulative dividends and was to be redeemable in real estate. I can bring with me a copy of this stock showing what it covers. It is protected by the entire assets of the Townsite Company, and the whole of the stock can be redeemed in real estate, but it must be taken up out of the dividends of the company. And this stock was drawn exactly in accordance with this contract, because we had this contract in mind when we organized the company.

Question. Containing that plan?

Answer. Yes, sir, the only time we ever used it in our lives.

134 Question. "Your plan proposed to repay the money we advanced from the sale of real estate." What real estate?

Answer. Real estate of the Miami Townsite Company.

Question. As mentioned in your contract?

Answer. Yes, sir.

Question. "We are, therefore, interested in the townsite end of it to the extent of receiving the money." What money?

Answer. Money that he paid me on this contract.

Question. This seventeen thousand dollars that was advanced?

Answer. Yes, sir.

Question. Now, did Mr. Hoveland or the Cordova Copper Company, before they commenced this suit, ever demand these mineral rights of you—a conveyance of them?

Answer. No, sir, they did not.

Question. But they did make a demand on you after the suit was commenced, did they not?

Answer. Judge Nave did this in their behalf.

Question. I call your attention to letter head of Judge Nave, dated Globe, Arizona, April 25th, 1912. Is that the letter you refer to?

Answer. Yes, sir.

Question. When did you receive that?

Answer. On the same day, I believe it was written. Mr.
135 McCarthy hurriedly brought it out to my house and gave it to me in person.

Question. The manager of this company?

Answer. Yes, sir.

Mr. JACOBS: We offer it in evidence.

Mr. NAVE: No objection.

The COURT: It may be received in evidence and marked defendant's exhibit B-2.

Mr. Jacobs hands exhibit B-2 to the jury to read.

The COURT: Mr. Jacobs, wouldn't it save time if you would read that to the jury.

Mr. Jacobs reads exhibit B-2 to the jury.

Question. That is the only demand you ever did receive, is it not?

Answer. That is the only one, yes, sir.

Question. And at the time this action was commenced. I will withdraw that. In your letter to Mr. Van Dyke of April 28th, 1909, in which you spoke of a tentative agreement, is that the letter you have there?

Answer. This is May 28th.

Question. May 28th, 1909, in which you spoke of a tentative agreement. What did you mean by "tentative"?

Answer. I meant that there were those few conditions that I have mentioned heretofore were yet to be fulfilled, and until he had appeared and investigated the property and found out—that is the form of condition stated there—that the bond was considered tentative up to that time. And he came down along about the middle of May, I think along about the 15th, in there somewhere, and examined the property. I considered everything done up to
136 the examination under this tentative; and that is the reason why this first advance carried six per cent. interest, so that the thing could be kept in status quo until such time as things could be straightened and stock provisions made which would fulfill our agreement.

Question. Now the Cordova Copper Company advanced you seventeen thousand dollars did it?

Answer. Total, yes. Seven thousand dollars in Duluth and ten thousand dollars on this draft.

Question. And the first money was advanced to you on your first trip to Duluth in January, 1909?

Answer. Yes, sir, January and February First part of February and the last part of January.

Question. And the second advance of five thousand dollars; that was advanced to you—Where were you at that time?

Answer. I was in Duluth, Minnesota. The idea when we received the first two thousand dollars was that Mr. Hoveland would come down and investigate conditions then the next five thousand dollars would be paid; but he was called to New York and I presume his business kept him in New York, anyway he didn't get back to

meet—to take care of this condition, so I returned from Saint Paul, where I had been in the meantime, to see him, and found upon my arrival in Duluth that he had not yet returned from New York. When I arrived in Duluth I asked of his office if they had
137 received any instructions from Mr. Hoveland to take care of this matter, and they said they had not received any instructions, so I wired Mr. Hoveland in New York concerning it asking what arrangement he had made to make the payment, and he wired back he would instruct Mr. McCarthy, who was his manager in Globe, to make the payment in my behalf if satisfactory to me and to wire him if satisfactory, which I did, and Mr. McCarthy made that payment and later on they sent me a voucher to sign for this payment. It was all a part of this original contract.

Q. I call your attention to a telegram signed by you and addressed to H. B. Hoveland of date of February 11th, 1909. Is that the telegram you sent to him?

A. That is the answer.

Q. That is signed Cleve W. Van Dyke?

A. That is my answer to him. There were three telegrams. I sent one to him and he replied to me and this is the last reply. This is a copy of the last reply sent to me by his office——

Q. Here we are. Now I call your attention to a telegram signed by H. B. Hoveland, dated at New York, February 10th, 1909.
138 Did you receive that telegram from Mr. Hoveland?

A. Yes, sir.

Mr. JACOBS: We offer it in evidence.

Mr. NAVE: No objection.

The COURT: Let it be received and marked defendant's exhibit C-3 in evidence.

Q. Now I call your attention to a telegram of February 11th, 1909. Is that the telegram you sent in response to the one sent you by Mr. Hoveland?

A. Yes, sir.

Mr. JACOBS: We offer it in evidence.

Mr. NAVE: No objection.

The COURT: Let it be received and marked defendant's exhibit D-4 in evidence.

Mr. Jacobs reads exhibits C-3 and D-4 to the jury.

Q. I call your attention to a telegram of date, Duluth, Minnesota, July 8th, Cleve W. Van Dyke signed by Mr. H. B. Hoveland. Did you receive that from Mr. Hoveland?

A. Yes, sir.

Q. And another from Mr. Hoveland, Duluth, Minnesota, July 10th. Did you receive that from Mr. Hoveland?

A. Yes, sir.

Mr. JACOBS: We offer the one of July 8th, in evidence.

Mr. NAVE: No objection.

139 The COURT: It may be received in evidence and marked defendant's exhibit E-5.

Mr. JACOBS: We offer the one of July 10th, in evidence.

The COURT: It may be received in evidence and marked defendant's exhibit F-6.

Mr. Jacobs reads exhibits E-5 and F-6 to the jury.

Mr. JACOBS: I have the original, judge, of that letter signed by Mr. Hoveland if you would prefer to have it filed instead of the copy.

Mr. NAVE: With the court's permission we will substitute this for the carbon copy now here.

The COURT: What is the exhibit? Letter of what date?

Mr. NAVE: It is plaintiff's exhibit F.

The COURT: Very well.

Q. I call your attention to a letter dated August 31st, 1909, signed by Henry B. Hoveland. Did you receive that letter from Mr. Hoveland?

A. Yes, sir.

Q. I call your attention to a letter of March 20th, 1909, on the letter head of the Globe Consolidated Copper Company, signed by Harvey P. Smith. Did you receive that letter?

140 A. Yes, sir.

Mr. JACOBS: We offer the letter of August 31st, 1909 in evidence.

Mr. NAVE: No objection.

The COURT: Let it be received and marked defendant's exhibit G-7.

Q. Who is Harvey P. Smith?

A. He is secretary for all these companies.

Q. Mr. Hoveland's secretary?

A. Secretary of the Cordova Copper Company. I don't know his official title. He is the man in charge of the office at Duluth, Minnesota.

Mr. JACOBS: This letter of date of August 31st, 1909 is in evidence. We offer the letter of March 20th 1909.

Mr. NAVE: No objection.

The COURT: It may be received and marked defendant's exhibit H-8.

Mr. Jacobs reads exhibit G-7 to the jury.

Q. You received this letter did you?

A. Yes, sir.

Q. He said in this letter: "I don't desire any new deal on the mineral." What did he refer to?

141 Counsel for plaintiff objects to the question on the ground that Mr. Van Dyke can not state.

Q. Did you ever have more than one deal in reference to the mineral rights of the Miami Townsite with Mr. Hoveland?

A. Yes, sir.

Q. More than one deal?

A. Not more than one deal. You will find in one of these very letters where I made the suggestion to him, that with his consent,

if he did not want the mineral deal under our original contract, I would be willing to sell it for him, and this letter is in reply to that. I told him if he didn't want to continue along this contract line, with his consent I would sell it the same as the other property, and that is his reply to that.

Q. What mineral did he refer to?

A. The mineral under the townsite.

Q. The letter to which this is a reply is letter of August 24th, 1909 sent by you to Mr. Hoveland?

A. What is the date of that last letter?

Q. August 31st. That letter of August 31st, is in response to this letter sent by you?

A. Yes.

142 Q. I call your attention to plaintiff's exhibit G in evidence, second paragraph on page two thereof, which reads: "The value is here in a mineral way, etc." Then you do have faith in its value?

A. Yes, sir.

Q. "I will dispose of the mineral ground and return the money you have invested, including all expense for these claims"?

A. Yes, sir.

Q. "Ten thousand dollars with the mineral rights of the land." What money?

A. To repay all that was invested.

Q. That is in your letter of the 24th?

A. Yes, sir.

Q. You offered if he did not want the mineral land you would attempt to dispose of the mineral and pay him back his money?

A. Yes, sir.

Q. This letter of August 31st, is in response to these in which he says "We want no new deal on the mineral"?

A. Yes, sir.

Q. Before the payment of that ten thousand dollars in July, 1909, did you send Mr. Hoveland that telegram of which this is a copy in cipher? (Hands telegram to witness.)

143 A. Yes; that is a copy of it.

Q. That is a copy of the telegram you sent?

A. Yes, sir.

Q. That was in cipher?

A. Yes, sir.

Q. Copy of the telegram—Is that properly translated there?

A. Yes, sir.

Mr. JACOBS: We offer the telegram of date of July 4th, signed by Cleve W. Van Dyke and addressed to Henry B. Hoveland—a coded telegram—together with translation pinned to it. We offer it in evidence.

Mr. NAVE: No objection.

The COURT: It may be received in evidence and marked defendant's exhibit I-9.

Mr. Jacobs reads exhibit I-9 to the jury.

Q. What payment did you refer to there?

A. The ten thousand dollars. You see the condition was this: Seven thousand dollars had been advanced prior to his investigating the conditions, and the time between the payment of the ten thousand dollars and his visit this thing was up in the air more or less because he had not yet, at the time of sending this telegram, determined to continue with the contract, because he had not as yet accepted the tentative portion of our agreement; so I wired this to find out whether or not he intended to continue the contract subject to our agreement made in January in Duluth and make
144 payment due on July 11th, which would close the contract.

Q. And in response to this telegram you received the money?

A. I received this telegram that we read here a few moments ago. He told me to draw on him at Duluth against the Cordova Copper Company for ten thousand dollars. In a day or so came another telegram stating let me know when draft made. I drew on him and got that ten thousand dollars.

Q. That was the third payment?

A. That was the third payment, yes, sir.

Q. Now, under the terms of this agreement, exhibit A, on page two, was any other money payments made you by Mr. Henry B. Hoveland or the Cordova Copper Company under the terms of that agreement?

A. No, sir.

Q. Nothing but the seventeen thousand you have testified to?

A. No, sir.

Q. What is the eight thousand dollars represented there? Was that paid you?

A. Balance never paid.

Q. Balance of eight thousand?

A. Yes, sir.

Q. Never received of Henry B. Hoveland, The Cordova
145 Copper Company or anyone acting for them?

A. No, sir.

Q. Never received the money at all?

A. No, sir; never paid the balance.

Q. Did Mr. Henry B. Hoveland or the Cordova Copper Company ever transfer to you any stock of the Cordova Copper Company under the terms of this agreement?

A. No; they did not.

Q. Did they ever subscribe to you any stock that you didn't subscribe and pay for in the open market?

A. No, sir, they did not.

Q. I call your attention to map purporting to be a sketch map of the Miami District. Have you seen that before?

A. Yes, sir.

Q. From whom did you receive that map?

A. I received this in May, as I remember it, from the Cordova Copper Company.

Q. I call your attention to that portion of the map which purports to fix that property of the Cordova Copper Company. Now will you kindly indicate on that map what portion is the Miami—You received this in the mail from the Cordova Copper Company?

A. Yes, sir.

Q. Do you know who issued those maps?

A. I suppose the Cordova Copper Company.

146 Q. You don't know?

A. No, sir.

Mr. JACOBS: We offer the map in evidence, your honor.

The COURT: It may be received and marked defendant's exhibit J-10.

Q. I will call your attention to defendant's exhibit J-10 and ask you to indicate on that map what portion of that map represents the Miami Townsite Company's property. Indicate with a cross?

A. Witness indicates as directed.

Q. Now, you can show to the jury what portion of the ground represented there is the Miami Townsite ground?

A. Witness points out to the jury that portion of the ground belonging to the Miami Townsite Company, as directed.

Mr. NAVE:

Q. In other words, the words "Cordova Copper Company" on this map, show on part of the map that covers the Townsite Company?

A. Yes, sir, the idea being that this group contained; that this company contained two groups: the Eureka Group and the Cordova Townsite Group, which is my group, and both were included in the Cordova Copper Company; that is, the mineral rights in mine and all the rights in the Eureka.

Q. Do you recollect about the time the Cordova Copper

147 Company was organized?

A. I don't quite hear you.

Q. I say do you recollect about the time the Cordova Copper Company was organized?

A. Yes, in the Spring of 1909.

Q. Was that before or after the five thousand dollars' payment was made by the company to you?

A. They paid me seven thousand dollars before the organization of the company.

Q. Seven thousand dollars were paid you before the company was organized?

A. Yes, sir.

Q. Now this map, do you recollect whether or not the Cordova Copper Company claimed to have any interest in this ground of the Miami Townsite Company before they made the payment of ten thousand dollars on July 14th?

A. I don't quite understand. How was that?

Question read.

A. No, sir, they had no interest and claimed not interest that I know of.

Q. What I mean is in the way of prospectuses. Did they issue prospectuses before they paid you the ten thousand dollars?

A. You mean before the final ten thousand dollars?

Q. Yes?

A. Yes, sir, prospectuses were issued before that and maps
148 were issued before that; that is, in which they claimed interest in these mineral rights. I forget the exact date of the issuance of these maps.

Q. Has the Cordova Copper Company ever submitted to you any other contract in reference to these mineral rights of the Miami Townsite ground other than the contract expressed in exhibit D?

A. After the last ten thousand dollar payment was made, several months after, about the time when they began to make up their minds to abandon the property, Mr. Hazzard came into my office——

Q. Who is Mr. Hazzard?

A. Their attorney, or was at that time. I was very busy and while I was sitting at the table he pushed a contract under my face and says "I have received instructions from Mr. Hoveland to have you sign a new contract." I says "Mr. Hazzard I am very busy at this time and I have not got time to take care of this now." He says "I demand your answer right now on this thing." I glanced over it and I says "If you want my answer right now, that is not in accordance with my agreement with Mr. Hoveland." I positively refused to sign it and I returned the contract to him.

Q. And you did not retain a copy?

A. No, sir, I think you will find in my carbons a letter from Mr. Hoveland that he intended to do this.

149 Q. That, you say, was after the Cordova Copper Company had concluded they did not want these mineral rights?

A. I don't know the exact date they determined that, but it was only a short time before they ceased mineral operations on the Eureka Group that this new contract was presented to me.

Q. And while they were getting short of funds?

A. I presume they were. They were after me every day for money for their payroll about that time.

Q. Do you remember what that contract was?

A. No. I think Mr. McCarthy could tell you what was in it. I think he was with him at the time. The contract did not cover the conditions of our understanding and I was very busy at the time. It was shortly after opening the townsite that he came into my office in the middle of the day and demanded an immediate reply without giving me a chance for consideration. He took the contract back with him and I remember it was absolutely absurd and not in accordance with my agreement. I simply told him I would not consider it and he could have my answer right now. He knew better than to present a thing of that kind. I never varied from the original contract. That has been my understanding all the way through; and in numerous conversations with various parties to the
150 property I have always insisted upon it. One thing further I would like to say: I met Mr. Hoveland at the Auditorium

Annex hotel in Chicago about that time, as Mr. Hoveland will recollect, and asked to make a date with him and I tried to do everything I could in my power to adjust this thing if there was a desire on their part to withdraw from the contract. Mr. Hoveland made a date with me but did not keep it. I did not see him again.

Q. That was after they submitted this contract to you through Mr. Hazzard?

A. Yes, sir.

Q. You realized then they wanted to be released from their contract?

A. I realized their definite objection to taking over the property. I had about made up my mind that the Cordova property was a failure and they did not care to take it over. They made no further payments in the matter, simply withdrawing off the field. I thought that under the circumstances if I could get to Mr. Hoveland and get some kind of an arrangement with him we could settle up the proposition. There was no desire on my part to defraud anybody out of any money. I simply wanted the return of the money I had advanced them. I wanted equitable treatment.

Q. That was the reason you made the appointment with Mr. Hoveland?

A. Yes, sir.

151 Q. And he failed to keep the appointment?

A. Yes, sir; left town I believe.

Q. Do you recollect the time shortly before the institution of this law suit of meeting Mr. Hoveland here in Globe?

A. How long before?

Q. In which Mr. Hoveland demanded payment of this money?

A. Yes, that was along about the time—I don't know whether before or after the contract incident with Mr. Hazzard, and I only saw Mr. Hoveland at the hotel. I was in his room discussing the thing with him—I wanted to discuss it with him but he would not discuss anything, he simply said—I talked to him and he answered back "I want you to return that money." He was arrogant in his manner towards me. I staid with him in spite of his lack of hospitality two or three hours, and he finally undressed and went to bed, and the last thing he said was "All I want is that money." I tried in every possible way a gentleman could to arrange it but without success. His attitude has been absolutely arrogant and unnecessary in my opinion.

Mr. JACOBS: Now this witness was called, if it please the court, for cross-examination by the plaintiff, and I think we have examined him—I don't know what you are pleased to call it—I think

152 we have examined him at this time on all matters that have been gone into upon cross-examination, but I may want to recall him at a later time and I would not want to be precluded from doing that.

The COURT: You have a right to do so in your own defense.

Recross-examination.

By Mr. NAVE:

Q. Mr. Van Dyke this is another telegram you sent to Mr. Hoveland just before the payment of that ten thousand dollars, is it not?
A. Yes; I sent that.

Mr. NAVE: We offer it in evidence.
The COURT: It may be received and marked plaintiff's exhibit L.
Mr. Nave reads exhibit L to the jury.

Q. Now, Mr. Van Dyke, you said that that contract, that paper which is in evidence here marked exhibit A, duplicate marked exhibit B, was typed in Warren by a typewriter employed by Mr. Hoveland and dictated by Mr. Alderman, is that correct?
A. No, sir.
Q. What was your statement?
A. I said I prepared notes for the contract and that as I remember it these notes were submitted to Mr. Alderman and Mr. Alderman had the typewriter write them.
153 Q. And then the document is a copy of your long hand preparation?
A. Practically, with such changes as an attorney would naturally make.
Q. You did not mean to say Mr. Hoveland directed the preparation of it? You don't mean to say the paper——
A. No, sir.
Q. He didn't direct Mr. Alderman in the preparation of the paper?
A. No, sir.
Q. The paper was prepared by you?
A. Yes, that was my terms. I was willing to do business with him under those terms.
Q. Now you mean to say Mr. Hoveland directed you to get options on the Show Me No. 2 and Myrtle?
A. Yes, sir.
Q. Didn't Mr. Hoveland repudiate that by letter and tell you you could handle that any way you wanted to?
A. I don't know whether he ever repudiated that afterwards. I know I have in my files, if you care to see them. I have the options.

Mr. JACOBS: Wait a minute. I object to that as calling for a conclusion of the witness.

Q. Suppose you produce that letter from Mr. Hoveland in which he repudiates the options on the Show Me No. 1 and 2 and the Myrtle?

154 Mr. JACOBS: Wait a minute. If you will permit me I will put one more exhibit in.
Mr. NAVE: Very well.

Redirect examination.

By Mr. JACOBS:

Q. I call your attention to copy of articles of incorporation of the Cordova Townsite Company and indorsed. Are those the articles of incorporation of that company, Townsite Company?

A. Yes.

Q. Original?

A. Yes, sir.

Q. Signed by William Witt. These articles of incorporation were framed and prepared in accordance with your contract with Mr. Hoveland?

A. Yes, sir.

Mr. JACOBS: We offer it in evidence.

Mr. NAVE: We object upon the ground that it is utterly immaterial.

Mr. JACOBS: It is material in showing the compliance of this defendant in the organization of a Townsite Company—The Cordova Townsite Company—in accordance with this contract.

The COURT: It may be admitted and marked defendant's exhibit K-11.

Mr. JACOBS: I want to examine him on that judge Nave
155 with your permission.

Mr. NAVE: All right.

Mr. Jacobs reads exhibit K-11 to the jury.

Q. These incorporators William Witt and L. L. Hayden. Now, who is William Witt?

A. Mr. McCarthy's secretary or bookkeeper.

Q. And was at this time?

A. Yes, sir.

Q. Mr. McCarthy was manager for the Cordova Copper Company was he?

A. Yes, sir.

Q. Was this incorporation organized before or after the Cordova Copper Company?

A. After.

Q. At that time Mr. McCarthy was manager of the Cordova Copper Company and Mr. Witt was his secretary?

A. Yes, sir.

Q. Who is L. L. Hayden?

A. Attorney, assistant to Mr. Hazzard.

Q. And was at that time?

A. Yes, sir; drew up articles.

Q. In the organization of this Cordova Townsite Company—I will withdraw that. Well was this organization of this Cordova Townsite Company by your request?

A. Yes, sir.

156 Q. Why did you select William Witt, secretary for Mr. McCarthy, manager of the Live Oak Company and L. L.

Hayden, assistant attorney for the Live Oak Company as incorporators?

Counsel for plaintiff objects to the question upon the ground that it is utterly immaterial and afterwards withdraws his objection.

Question read.

Q. How did they happen to be the incorporators?

A. I discussed this thing with Mr. Smith——

Q. What Smith?

A. Hoval A. Smith.

Q. He was an officer of the Cordova Copper Company?

A. Yes, sir.

Q. It was at his suggestion that you selected Mr. Witt?

A. They said they wanted to keep in tough with the situation to see that things were done in accordance with our agreement.

Q. Hence the articles of incorporation were for the Cordova Townsite Company?

A. Yes, sir.

Q. Is that the name of the corporation now?

A. No, sir.

Q. What is the name?

A. Miami Townsite Company.

157 Q. Why was the change made?

A. Mr. Hoveland had requested me while in Duluth to name the Townsite Company after his copper corporation after it should be determined. I agreed to this. Naturally I wanted the corporation called the same as the Townsite was. We had a big fuss about that——

Q. Who had a fuss?

A. Myself, the railroad and the Miami Copper Company.

Q. Was it done with the consent and at the suggestion of Mr. Hoveland of the Cordova Copper Company?

A. You mean judge——

Q. Was the change made with the consent and at the suggestion of Mr. Hoveland?

A. I didn't change it until we had a meeting between the Miami Copper Company, Mr. Mike McCarthy, Mr. Smith and myself. I got Mr. Smith and the Cordova Copper Company to consent to the change and when they did I changed it.

Q. Was the change made in the capitalization in the common or preferred stock?

A. No, simply amended the articles changing the name.

Q. Did Mr. Witt and Mr. Hayden remain officers of incorporation?

A. They resigned as soon as the organization was completed and turned over to myself and other officers.

158 Recross-examination.

By Mr. NAVE:

Q. Then Mr. Witt and the rest of them were simply used for the purpose of organizing the company?

A. Yes, sir.

Q. Just the same as any other dummies would be for the same purpose? It was turned over to you immediately?

A. Yes, sir.

Q. They didn't remain officers or stockholders?

A. No, sir, after the organization of the company that was all——

Mr. JACOBS:

Q. They were there to keep in touch with matters for Mr. Hoveland?

A. I presume so, yes, sir.

Mr. JACOBS:

Q. To see that the organization was in accordance with your contract?

A. Yes, sir, that was my understanding at the time.

Q. Now with regard to this Show Me that you say you were asked to get option on, I will ask you if that is not your telegram? (Hands telegram to witness.)

A. Yes, sir.

Q. That is your telegram?

A. Yes, sir.

Mr. NAVE: We offer it in evidence.

Mr. JACOBS: I object to it upon the ground that it is irrelevant, immaterial and not proper recross-examination, and that it
159 has nothing to do with the issues in this case, neither does it tend to prove or disprove any of the issues in this case. Show Me is not involved here.

Mr. NAVE: I urged that strongly but your honor overruled it.

The COURT: It may be received and marked plaintiff's exhibit M.

Mr. JACOBS: We reserve an exception.

Mr. Nave reads exhibit M to the jury.

Mr. JACOBS: What was the date of that judge?

Mr. NAVE: March the 18th.

Q. Now, in reply to that didn't you receive this telegram? (Hands telegram to witness.)

A. Yes, sir.

Mr. NAVE: I offer it in evidence.

Mr. JACOBS: Same objection.

The COURT: Same ruling.

Mr. JACOBS: Exception.

The COURT: It may be received and marked plaintiff's exhibit N. Exhibit N read to the jury by Mr. Nave.

Q. Now then you replied to that with this telegram did you not? (Hands telegram to witness.)

A. I believe so, yes, sir.

Mr. NAVE: I offer it in evidence.

160 Mr. JACOBS: Same objection.

The COURT: Same ruling.

The COURT: It may be received and marked plaintiff's exhibit O.

Mr. Nave reads exhibit O to the jury.

Q. Didn't you receive that reply to your telegram? (Hands telegram to witness.)

A. Yes, sir.

Mr. NAVE: I offer it in evidence.

A. There were other considerations on this same deal.

Mr. NAVE: I am going to produce them. You saw this yesterday, but I will refresh your memory by it now. (Hands telegram to witness.)

Mr. JACOBS: Same objection. We object to this offer now of this telegram of March 20, 1909, on the ground that it is irrelevant, immaterial and incompetent; also not proper cross-examination. It does not tend to prove or disprove any of the issues in this case.

The COURT: Same ruling. Received and marked plaintiff's exhibit P in evidence.

Mr. JACOBS: We wish the records to show that we reserve an exception to your honor's ruling.

Exhibit P read to the jury by Mr. Nave.

Q. In response to the telegram of the 19th, didn't you write that letter? (Hands letter to witness.)

A. Yes, I wrote that.

161 Mr. NAVE: I offer it in evidence.

Mr. JACOBS: If your honor please, before reading that I wish to have noon recess.

The COURT: Very well.

Mr. NAVE: Let it be marked for identification.

The COURT: It may be received and marked plaintiff's exhibit B-2 for identification.

Noon recess. Jury admonished and excused until 1:30 P. M.

After recess. Call of jury. All Present.

The COURT: Proceed.

Mr. NAVE: I have just offered a letter in evidence.

Mr. JACOBS: I am just reading the letter. We object to the offer upon the ground that it is irrelevant, immaterial and incompetent. If the court will glance over it he will see it has nothing to do with this case.

The COURT: Does it tend to prove the telegrams mentioned.

Mr. NAVE: That is offered only to meet an issue injected by Mr. Jacobs with respect to Show Me, Show Me No. 2 and Myrtle claims.

Colloquy between court and counsel.

The COURT: If you are sure that is the purpose of it I will admit it. The objection will be overruled.

Mr. JACOBS: We reserve an exception to your honor's ruling.

The COURT: It may be received in evidence and marked
162 plaintiff's exhibit Q.

Mr. Nave reads exhibit Q to the jury.

Q. Now will you produce Mr. Hoveland's letter dated the 23rd.

Mr. JACOBS: Let me see your copy. Have you the copy?

Mr. NAVE: Yes. (Hands copy to Mr. Jacobs.)

Mr. JACOBS: We object to the letter upon the ground that it is irrelevant, immaterial and incompetent. The proper foundation for the admission of the letter has not been laid; and upon the further ground that it does not tend to prove or disprove any of the issues in this case and is not proper cross-examination.

Mr. NAVE: In reply to that objection I reduce my offer to the third paragraph of the letter, which I am numbering with a lead pencil "3."

Mr. JACOBS: Same objection to the third paragraph. Proper foundation not laid.

Q. I call upon you to produce the original of letter from Mr. Hoveland to you dated April 23rd, 1909, of which I hand you a copy?

A. I don't think I have the original.

Q. You received the original of which this is a copy?

A. If my memory serves me correctly there was a letter
163 like this mailed me. I can't tell definitely; I presume this is a copy.

Mr. NAVE: I offer the third paragraph marked "3" of this letter.

Mr. JACOBS: Same objection, especially foundation not laid for its admission.

The COURT: That is one of the claims you were inquiring about?

Mr. NAVE: Yes, your honor, that is a reply to a letter from Mr. Van Dyke that has just been read, and that particular paragraph is the only part that treats of that letter.

The COURT: Very well, the objection will be overruled. Paragraph three of the letter dated April 23, 1909, may be received and marked plaintiff's exhibit R in evidence.

Mr. JACOBS: We reserve an exception to your honor's ruling admitting the letter in evidence.

The COURT: Very well.

Mr. Nave reads exhibit R (Paragraph three of letter) to the jury.

Q. Now, Mr. Van Dyke, didn't you glance at that paper Mr. Hazzard handed you to sign?

A. I remember it, yes, sir.

Q. Didn't it provide for the conveyance by you of the mineral rights under the townsite?

164 Counsel for defendant objects to the question upon the ground that it is not the best evidence.

Mr. NAVE: It is simply a matter of correcting a statement made by Mr. Van Dyke.

Objection withdrawn.

Q. With your recollection of that transaction between you and Mr. Hazzard you still say it wasn't demanded? He demanded you to execute that contract didn't he?

A. It was some new contract he presented; wanted me to sign a new contract and I refused to consider it because it wasn't in accordance with my agreement.

Q. But he did demand you to execute it?

A. He demanded I sign it; said Mr. Hoveland sent him there with it, but it wasn't in accordance with our agreement and I positively refused to sign it on that occasion as I remember it. It surprised me completely.

Q. Didn't Mr. Hazzard at that time state to you that you were under obligations to convey those mineral rights?

Counsel for defendant objected to the question as irrelevant and immaterial what Mr. Hazzard said.

Question read.

A. I don't remember——

Mr. JACOBS: Just a moment. I object to what Mr. Hazzard said as hearsay and irrelevant and immaterial.

165 The COURT: The objection will be sustained as hearsay.

Mr. NAVE: Just a moment—You may have the witness.

Redirect examination.

By Mr. JACOBS:

Mr. JACOBS: I would like to ask the attorney- for the plaintiff if they have a letter in their possession written by this defendant, Mr. Van Dyke to Mr. Hoveland dated the 13th of May?

Mr. NAVE: Yes, sir. By the way, you can look at that while I go ahead. My attention has just been called to something I was overlooking.

Recross-examination.

By Mr. NAVE:

Q. Mr. Van Dyke did you read the letter of which this is a copy (Hands copy of letter to witness) written by Mr. Hoveland to Mr. Hazzard, and state to Mr. Hoveland that you had read it?

Counsel for defendant objects to the question upon the ground that it comprises two questions.

Mr. NAVE: Very well I will segregate them and let it stand to the first.

Q. Didn't you read that letter Mr. Hoveland wrote to Mr. Hazzard?

A. I don't get the question judge?

166 Question read. (Witness reads letter.)

A. I don't recollect ever having read this before. I

don't think I have, judge. As I remember it Mr. Hazzard had a contract that embraced some of those features that he asked me to sign. I don't recollect ever having read that letter before.

Q. Mr. Van Dyke, between the time that Mr. Hazzard presented that contract to you and the following March, I believe it was Mr. Hoveland was in town and you had a conversation with him, probably in the month of January——

Mr. JACOBS: Of what year?

Mr. NAVE: 1911, about Christmas to——?

A. That is when I met him in Chicago.

Q. Did you meet him here at the hotel?

A. I met him here at the hotel this Christmas and after Christmas, along the first part of the year, I met him at the Auditorium Annex in Chicago.

Q. Did you meet him within a few weeks of that time at the Dominion hotel here?

A. I met him, as I said this morning, at the time that I imposed upon his hospitality by remaining with him until after he went to bed.

Q. Was that here?

A. That was at the Dominion Hotel, I don't remember the exact date. As I remember it it was late in the Fall.

167 Q. At that conversation, at the time you say he went to bed, didn't you tell Mr. Hoveland that you had read that letter he had written to Mr. Hazzard?

A. I don't recollect ever having made a statement of that kind. I never got that far in the conversation with Mr. Hoveland, he wouldn't get away from that point.

Q. He wanted the money badly?

A. He seemed to want it very badly.

Mr. HENRY B. HOVELAND, sworn for plaintiff, testified as follows:

Direct examination.

By Mr. NAVE:

Q. You are H. B. Hoveland?

A. Yes, sir.

Q. What relation do you sustain to the Cordova Copper Company, the plaintiff in this case?

A. President of it.

168 Question. How long have you been its president?

Answer. Even since its beginning.

Question. What relation if any did you sustain in January, 1909, to the Live Oak Development Company?

Answer. Vice President of it.

Question. Mr. Hoveland when first did Mr. Van Dyke take up with you the matter of helping him out on this townsite transaction?

Answer. In January, 1909.

Question. Will you state as fully as you can what passed between you and Mr. Van Dyke at that time with respect to the matter?

Answer. I can not give the exact part of the month, but I believe it was in the latter half of the month when Van Dyke came to Duluth to see me. He had a contract for the purchase of some claims in the Miami district and represented to me that he wished to float a townsite for the district. He said he had no funds for that purpose—for the purpose of paying for this property, and desired me and my associates, or the companies with which I was connected, to advance money for the financing of his scheme——

Mr. NAVE: Will you turn towards the jury if the court will permit it?

The COURT: I will.

(Witness continues:) I replied to him that myself and associates and companies would not join in a townsite scheme and take a part in the townsite feature of it, and he directed my attention to the desirability for the various companies in which we
169 were interested in that camp of having a townsite there to furnish places for the men to live, and so on, and for that reason he thought we should be sufficiently interested to go in with him on it. He also directed my attention to the possibilities of value in the mineral rights of the ground he had opened, and suggested that that might be—appeal to us as of value. He said as to the mineral; that as to the mineral operations that was of lesser interest to him inasmuch as he was not competent, he said, to carry on exploration work on his ground and thought we might frame up some deal to take over the mineral. His desire particularly was to handle the townsite and make his money out of the townsite end. He talked of plans of handling the matter whereby the surface would be segregated from the mineral, we would acquire the mineral and he the surface and he talked of plans along the lines of the draft of agreement set out in the complaint which I heard here——

Mr. JACOBS: You mean answer?

Answer. Answer to the complaint which I heard read here the other day. After discussing that for sometime I replied that it did not appeal to me, and that in any plan that might be worked out involving the advancement of money to him we would not become interested in the townsite feature of it, but would, under favorable circumstances, take part in the mineral right; and I refused to go in—to enter into the agreement which he there submitted. He said he was negotiating with other people and
170 one of the reasons for his coming to me and my associates was that he would rather have our crowd go in with him than others, because if others went in with him the surface and the townsite feature would naturally have to be divided up and he would be able to carry and control a lesser portion of the townsite feature and he would get in with people whom he did not know so well. After refusing—after my refusing to go into the agreement represented by a paper draft he had there he asked me if there were not some other plan whereby we would consider going in with him. I recognized that a townsite in that section would be of value to the mines and the operations in that section——

Mr. JACOBS: We object to what he realized. The question is what was said and done.

Mr. NAVE: Confine yourself and statements to the case—

Answer. I was going to give a reason for my action.

Mr. NAVE: Never mind.

Answer. Very well. I made him the proposition that our company might advance the cash under some condition whereby we would get it back again and wherein he would be left free to go right on with his townsite. I made him the proposition finally of guaranteeing—I want to put something just before that "I made him the proposition." He represented to me that he desired a guarantee in some manner of all the payments on the option to be made so as to give him the assurance to go ahead with his townsite.

171 It appeared that the total amount involved on his option was twenty-five thousand dollars; that would check the total debts of the property. I agreed to have advanced to him, either through our companies or personally see that it was advanced to him, this amount in money in the various payments, or as much as necessary thereof, for Mr. Van Dyke had represented to me that while this total amount of twenty-five thousand dollars was due on the property, he expected to float the townsite long before this total amount was due, and that if he guaranteed it it would not be necessary probably to put up all of this twenty-five thousand dollars, and I agreed to advance as much as would be necessary to see that he got the titles to the property, on condition that we secure the minerals for the contemplated company to be organized for the handling of the Eureka Group on which we had an option at that time. This Eureka Group lies immediately north of the ground that Van Dyke had an option on. The Eureka Group was optioned in December, 1908, the payments running over a period of about two and one-half years, and it occurred to me inasmuch as we were to start up operations on the Eureka that this ground would fit in and we might ultimately explore it in those same sections through the shafts that we might put in there. The talk and deal was, as we left it, that I advance him the money——

Mr. JACOBS: I object to the conclusion of the witness as to what the deal was and ask that he be confined in his testimony to what he said and what Van Dyke said.

172 Answer. I can not, Mr. Jacobs, repeat word for word. I am trying to give the substance. Do you wish to hold me to an exact repetition?

Mr. JACOBS: To the best of your recollection. Testify what was said by you and Mr. Van Dyke. If you can not testify to what was said I do not want your conclusion.

Mr. NAVE: The rule is correct. We have tried to enforce it but could not. Complete what you did Mr. Hoveland as far as you can.

Answer. Under that understanding—rather Mr. Van Dyke pointed out to me that he was in need of funds for laying out townsites, for grading, for the preliminary work, enumerating them, I asked him how much and he said he thought about two thousand

would do him. I asked him how soon he expected to put the townsite on and how soon he expected to pay the money back. He told me that he was going back there and he expected to put on the townsite directly and that he expected to put on the sale of lots in the course of two or three months. I then asked Mr. Harvey P. Smith——

Mr. JACOBS: I object to what he asked Mr. Harvey P. Smith unless what he asked Mr. Harvey P. Smith was in the presence and hearing of this defendant.

Answer: It was, I think.

Mr. NAVE: Before you come to what Harvey Smith did in this, you have omitted stating what the defendant Van Dyke promised to do with respect to the money if you paid over the money?

Answer. I have stated he promised I should have the mineral rights.

173 Mr. NAVE: Did he make any statement to you with respect to the money?

Answer. The money was to be used on this ground and on payments on the property. It was to be used in this preliminary work of grading and preparing for the town, preparing for the sale of lots, and further advances were to be applied as payments on the property. Those payments he was called upon to make, which payments I now understand he did make.

Question. Did he assume—did he state he would take any obligations with respect to you and your company with respect to the money? Did he say anything with respect to paying back the money?

Answer. Yes, sir.

Question. What did he say about paying it back?

Answer. The understanding and the talk was, at all times——

Question. Was the money—He agreed to pay back the money?

Answer. ——.

Counsel for defendant objects to the question upon the ground that it calls for a conclusion of the witness.

Question. Did he say——

Mr. JACOBS: Leave the witness.

Colloquy between counsel.

Answer. Mr. Van Dyke agreed to pay back the advances of money that I agreed to make to him.

Question. And at any time in conversations with Van
174 Dyke has this feature been questioned?

Answer. At all times it has been conceded by Mr. Van Dyke that the moneys advanced by me—of companies in which I am interested, to him, should be returned.

Question. Was there any agreement with respect to interest?

Answer. With interest at six per cent.

Question. Proceed. You were about Mr. Smith at that time when I interrupted you. What did you do then?

Answer. I was engaged in some strenuous affair, I don't recollect.

I was about to leave for the east as I recall it, and Mr. Harvey P. Smith at my outline wrote out a voucher for two thousand dollars.

Question. I show you paper marked exhibit one for identification and ask you if that is the paper?

Answer. Yes, sir.

Question. Very well, proceed?

Answer. From that time on——

Question. Did Mr. Van Dyke have anything to do with this paper?

Answer. Mr. Van Dyke was presumed to come in my office in Duluth and he signed it.

Question. Was it written as it is now when he signed it?

Answer. Yes, sir.

Mr. NAVE: I offer the paper now *of* evidence.

175 The COURT: It may be received and marked plaintiff's exhibit S.

With the permission of the court Mr. Nave reads exhibit S to the jury.

A. (Witness continues:) That ground was paid for under the conditions that I have outlined and not on the draft or agreement which I had refused to sign and which I had refused to concur in.

Question. How did the date become fixed at May 19th, Mr. Hoveland for the payment of it?

Answer. My recollection there is that Mr. Van Dyke represented that he wanted, when asked how he would repay that money——

Mr. JACOBS: Just a moment. He says that is his recollection. I want the facts, the knowledge of this witness and not recollections.

Mr. JACOBS: If you know Mr. Hoveland what Mr. Van Dyke said to you——?

Answer. Perhaps that was an unfortunate expression to say "recollection" right there. I had in mind the length of time. I don't remember how the discussion came up to fix the exact length of time for this. I said Mr. Van Dyke expected to put on the townsite and calculated that about that time by the sale of property he would realize sufficient to pay this money.

Question. Did you at that time have any conversation with Mr. Van Dyke other than the general agreement you have now stated there was an advancement to him under that, with reference to the five thousand dollars made a few days later or a month later?

Answer. That was one of the payments on the option he had, Mr. Van Dyke placed before my option for the purchase of the ground which he had in the Miami camp. And one of the pay-

176 ments was five thousand dollars and that I agreed to make and it was made when I was called upon for it.

Mr. NAVE: I offer in evidence assignment to the account of two thousand dollars from the Live Oak to the Cordova.

Answer. (Witness continues:) I forgot to say that I agreed with Mr. Van Dyke that if, that when the Eureka should be floated, and in the event that that new company should give me any promotion

stock, or privileged stock, that I would give him some of that, because he asked to have in some manner a run on the mineral speculation in the camp.

Question. What did you do with respect to keeping that part of the agreement?

Answer. I offered him one thousand shares of the same kind of stock we had.

Question. That was all you had?

Answer. No, we had more.

Question. No, I don't mean quantity. All you had was originally purchased?

Answer. Yes, sir, the Cordova was organized and was offered two dollars call on ten dollars par. When Mr. Hoval A. Smith, the party in whose name the option for the purchase of the Eureka Group stood, assigned his option and right to the Cordova Copper Company, he did so in consideration of the right to purchase seventy-five thousand shares of stock at two dollars per share for a given length of time, by paying the same amount that the other people paid for the stock; that any one paid for the stock.

177 Question. And you tried to share that right with Mr. Van Dyke?

Answer. Yes, sir.

Mr. NAVE: Have you any objection to this offer?

Mr. JACOBS: No objection.

The COURT: It may be received and marked plaintiff's exhibit T.

Mr. Nave reads exhibit T. to the jury.

Question. Now, Mr. Hoveland, in addition to advancing the five thousand and seven thousand dollars, what else did you do with respect to advancing money under your agreement with Mr. Hoveland—with Mr. Van Dyke?

Answer. I was called upon for another ten thousand dollar payment. I have forgotten the date of that, in the middle of that summer, 1909, as I recollect it, which payment I made.

Question. Were you ever called upon any more?

Answer. Yes, sir. When I say I made it I am speaking for the Cordova Copper Company because that was organized at that time.

Question. It was done by your company to the Cordova Copper Company?

Answer. Yes, sir.

Question. And the five thousand dollars that was paid was paid to the Cordova Copper Company?

Answer. Yes, sir.

Question. And the two thousand dollars that was paid was taken up?

Answer. Yes, sir, the moment, I believe, the five thousand dollars was advanced, I am not certain. Five thousand dollars was

178 paid, either paid by the Cordova Copper Company or assumed by the Cordova Copper Company after the Live Oak had advanced it. The Cordova Copper Company repaid five thousand to the Live Oak and assumed that.

Q. In any event the voucher Mr. Van Dyke signed was for account of the Cordova?

A. Yes, sir.

Q. And the two thousand advanced to the Live Oak was repaid with interest by the Cordova when organized?

A. It was paid back, yes, sir.

Q. Did Mr. Van Dyke ever request you to pay any sum of money. With respect to this townsite company did Mr. Van Dyke ever make any request on you to pay money?

A. I don't recollect any, no sir, he did not, except the request I have heard discussed here in court.

Q. That is except. I don't know what you refer to?

A. To the eleven thousand dollars balance of some sort that they are putting in a claim for.

Q. He did not make that claim of you before this law suit?

A. No, sir.

Q. Has not made it anywhere else except in court here?

A. No, sir.

Q. Did not know it was made at all till you heard his attor-
179 ney read it? Is that true?

A. That is true.

Q. Now, what did you conceive to be the proposition of Mr. Van Dyke when he sent you this letter of May 28th, marked exhibit E and this copy of an agreement marked exhibit D?

Question objected to by counsel for defendant upon the ground that what he conceived on that occasion is a conclusion of the witness, remarking further: "The letter speaks for itself. Its language is plain and clear, and his conception of what was intended to be had is not binding on this defendant. It is irrelevant and immaterial."

Mr. NAVE: I confess the objection.

A. I had in Duluth——

Mr. NAVE: Just a moment. I withdraw the question.

Q. When you paid the ten thousand dollars, or caused it to be paid by your company, in July, in pursuance of what agreement with Mr. Van Dyke did you cause it to be paid?

A. I caused it to be paid in pursuance with my guarantee made to him to make the payments that I might be called upon to make on the mining claims he had under option: the agreement I made with him of advancing sufficient money to get the deeds if necessary, and not upon——

180 Mr. JACOBS: We object to the latter part as not responsive. Objection sustained.

A. In Duluth Mr. Van Dyke, as I said, to the best of my recollection had a draft of an agreement, and in discussing it I recall it was along these general lines, but I can't say it was exactly along these lines, for after his departure I saw nothing of it and had no draft of agreement until I began to gather up the papers for this case, and this is the one I found and I found no other, so I am not able to say

that this agreement is the same agreement—draft of agreement *with* Mr. Van Dyke had in Duluth; that this draft of agreement is the same, I mean exactly in words.

Q. But it is something like that?

A. I should judge so, yes, sir. I had objected to those and refused those in Duluth.

Counsel for defendant moves to strike that until he can object to it on the ground that it is voluntary and not responsive to any question propounded.

The COURT: What is the question?

Mr. NAVE: There is no question.

Mr. JACOBS: I move to strike it out——

The COURT: It may stand. The motion is denied.

Mr. JACOBS: We reserve an exception.

A. I was asked about this ten thousand dollar payment and
181 on what contract I made that payment, and I am stating that I made it on the guarantee which I gave to Mr. Van Dyke that all his payments on the option would be paid on the agreement I made. He made an agreement that I should have the mineral rights——

Q. You or your company?

A. Me and my company. I am representing the company—The Cordova Copper Company; that our company should have the mineral rights, and although I had refused these——

Q. Now, by "these" you are referring to exhibits D and E?

A. D. It was in general form the same as I had refused to sign in Duluth, and had I refused to make that ten thousand dollar payment—I have forgotten the date when that was due——

Q. In July?

A. In July, I felt that I should have forfeited my rights to the minerals which Mr. Van Dyke had agreed to hold open, and I made the payment.

Q. Has Mr. Van Dyke ever repaid, or has anyone for him, ever offered to repay your company any portion of the funds advanced, except the sum of $2,515.66 paid on the 24th, of March, 1910?

A. No, sir, he has made one payment on the advances. I have written him a number of times, and the secretary of our com-
182 pany has written him a number of times requesting the repayment of the moneys. At no time has he denied, by letter or verbally, that he owes this money and that it should be repaid, but he has not paid any portion except that once.

Q. Nor to the Live Oak Development Company?

A. No, sir.

Q. Do you know what exchange, if any, your company paid on the ten thousand dollar draft which Mr. Van Dyke drew on you in July 1909?

A. Ten thousand dollar draft?

Q. Yes, sir.

A. Ten dollars as I recall it.

Q. Mr. Hoveland did you proceed in behalf of your company—of

the Cordova Copper Company—to advertise that you were entitled to the mineral rights on the Cordova Townsite?

A. Yes, sir.

Q. You did that in good faith?

A. Yes, sir.

Q. Do you remember how early you began advertising that fact?

A. I can not give the date, but in the early part of 1909; during the first three months sometime.

Q. I will show you defendant's exhibit J-10 and call your
183 attention to the date and ask you whether that enables you to fix the date—whether it was dated about there?

A. About that date.

Q. And that is what?

A. In the Spring of 1909 was my recollection. That is March 18th. It was sent out with first circular to subscriptions to the Cordova stock.

Q. It was before you came out to Arizona, subsequent to your interview with Van Dyke in Duluth?

A. It was subsequent to my interview with Van Dyke in Duluth.

Q. And before you came out to Arizona following that interview?

A. Yes, sir. I came out to Arizona in May, 1909.

Cross-examination.

Mr. JACOBS:

Q. You have a copy of defendant's exhibit D in your hands now, Mr. Hoveland——

Mr. NAVE: He has the original.

Mr. JACOBS: Original, this is a copy of the contract. I stand corrected.

A. D, yes, sir.

Q. Then Mr. Van Dyke did have this contract or a similar copy with him in Duluth when he first made the proposition
184 to interest you in the minerals in the Miami Townsite?

A. I did not state that.

Q. Did he or did he not?

A. I can not answer that yes or no. I made the statement here that he had a draft of an agreement with him at my best impression in Duluth in January, 1909; that my memory is that it involved plans similar to these, but I can not say whether it was an exact copy of this. It may have been and it may not have been.

Q. You won't say he did not present for your inspection and consideration an exact copy of the contract in evidence marked plaintiff's exhibit D?

A. No, I will not say that he did not.

Q. Those terms and conditions recited in plaintiff's exhibit D sound familiar to you do they not?

A. In what respect?

Q. All of the terms and conditions?

A. I do not recall. I would not recall all of them without referring to the terms and conditions.

Q. You have read that document, have you not?

A. Yes, sir.

Q. And you say now that he had a form of contract with him in Duluth similar to this one at least?

A. I can not say that, judge; that is my impression.

Q. And you and Mr. Van Dyke discussed the terms and conditions of that contract that he had with him at that time,

185 did you?

A. Not very much, because I was very busy, but we did discuss terms along those lines.

Q. You discussed the terms and conditions of that contract sufficiently to satisfy you that you did not want to enter into it, didn't you?

A. Yes, sir.

Q. How many discussions did you have with Mr. Van Dyke in Duluth in reference to the contract that he presented to you?

A. I could not say how many. He came into the office off and on and we talked about the townsite affairs and part of the time was taken up in discussing matters of more than appeared in reference to the contract. I could not say the proposed contract——

Q. There were several interviews were there?

A. I presume there would be several.

Q. Three or four or five, something like that?

A. Perhaps.

Q. He saw you in the daytime and saw you at night did he not?

A. I think so.

Q. You telephoned him the last night he was in Duluth, you telephoned him to come to your office or room, did you not, to discuss this proposition?

A. I could not state that from my own memory.

186 Q. You won't say you did not seek him by telephone?

A. No. I won't say that.

Q. Do you remember in the discussion of this matter in Duluth on that occasion of the kind of a corporation Mr. Van Dyke was supposed to organize as a townsite corporation?

A. Yes.

Q. What kind of a company?

A. It wasn't a supposed corporation by that time, it was proposed.

Q. Proposed? What kind of a corporation did he discuss with you?

A. I can remember only a few of the features he brought out. It was a corporation having preferred and common stock; the capitalization I do not remember.

Q. But required preferred and common stock?

A. Yes, sir.

Q. You did not object to that did you?

A. I don't recall just now what the objection was. I don't think I did on his part——

Q. Wasn't the capitalization one hundred and fifty thousand dollars?

A. I don't remember that.

Q. Would reading this contract refresh your memory upon that point Mr. Hoveland?

A. No, because I am not clear as to whether this is the
187 same draft as that presented in Duluth.

Q. Then you really don't know what kind of a contract Mr. Van Dyke presented to you on that occasion?

A. I could not reconstruct it, no.

Q. Could not state to the jury, in a general way, the substance of that contract?

A. The one Mr. Van Dyke proposed?

Q. Yes, sir?

Q. Yes. It was—He proposed to organize a company with preferred and common stock; that is about all I can recollect.

Q. That is all?

A. Yes, sir.

Q. He did not propose in that contract then to convey all the mineral rights to this proposed corporation, the Cordova Copper Company?

A. Yes, we can go that far and bring in some features in there. He proposed to transfer the minerals to the Cordova Copper Company as I remember it.

Q. You don't recall a provision in that contract to the effect that when this Cordova Copper Company was organized and its stock issued, that in consideration, as part consideration of the transfer of those minerals, Mr. Van Dyke was to receive fifteen per cent. of the capitalized stock?

A. I recall this much: In his provision he called for a
188 percentage which to my mind at that time seemed unreasonable and beyond what was right——

Q. You don't——

A. Pardon me. At that time I explained to Mr. Van Dyke that we hoped to get some privilege from the company to be organized—the name wasn't even then decided upon—and that when that privilege had been turned over to me, or to Mr. Smith in whose name the contract stood, we personally would hold some for him, so as to give him a run in the mineral, which he asked for. That was in the discussion of this contract.

Q. You mean by "a run in the mineral" as compensation to him for the mineral rights?

A. He said he wanted the same speculative feature in the minerals as we had.

Q. Do you not recall that in that contract that Mr. Van Dyke submitted to you on that occasion there was a provision for the subscription by the proposed corporation to twenty-five thousand dollars' worth of the preferred stock of the proposed Townsite Company?

A. I believe I do; that there was a proposal to subscribe for preferred stock, as to the amount I do not remember.

Q. Do you not recall that in that proposed contract submitted to you by Mr. Van Dyke on that occasion there was a clause providing for the twenty-five thousand dollars to be advanced by
189 you or this company to him to be paid and returned only out of the net earnings of the proposed Townsite Company?

A. I may have discussed that.

Q. You recall that now, don't you?

A. Out of this twenty-five thousand you say?

Q. That this twenty-five thousand you have testified to was to be returned to you, to the Cordova Copper Company, only—repaid only out of the net earnings of the proposed Townsite Company?

A. I did not testify to twenty--five thousand——

Q. Didn't that contract that Mr. Van Dyke submitted to you on that occasion provide that you or this proposed mining company should advance to him the sum of twenty-five thousand dollars for him to pay on his option to purchase the property known as the "Miami Townsite" now?

A. He must have proposed that, because he needed the money.

Q. Must have proposed it, of course. Didn't that same contract submitted to you provide that that twenty five thousand dollars should be paid only out of the net earnings of that proposed Townsite Company?

A. Its discussion may have taken that form.

Q. You recall it don't you?

A. I can not say I do exactly. In the matter of this contract, I did not enter into it, had I, I should have remembered it,
190 gone into it in detail and put it away. It was not accepted and for that reason I presume it escapes my memory more than it would otherwise.

Q. That contract you recall now provided—I presume you recall, I will ask you if you do—if that contract provided for the deposit, for the deposit in escrow in the bank of Bisbee for the advance by Mr. Van Dyke to you of mineral rights below a depth of forty feet below the property of the Townsite Company?

A. I can not remember that. The provision was for the deposit of the deeds in Bisbee.

Q. Yes?

A. I can not remember that.

Q. You don't recall that?

A. No, sir.

Q. Don't recall—That was your agreement with him wasn't it that he place the deed conveying these mineral rights to you in the bank? You know of no such agreement?

A. No, I can not recall that.

Q. As you recall the contract you were to pay as much money as he required to meet his payments on his option to purchase this Miami Townsite property, and that when you had done so he was to deed you the mineral rights?

A. Yes, sir.

Q. Now, and then he was to pay you back the money,
191 Is that right?
A. Yes, sir.
Q. He was to give you those mineral rights for nothing? Is that what you mean to tell me you contracted with him?
A. Perhaps some people would view it that way.
Q. Do you view it that way, Mr. Hoveland?
A. Well, no.
Q. You have been in the mining business a number of years, have you not?
A. Several years.
Q. You have been a promoter of mining corporations for many years, have you not?
A. Some.
Q. And you have promoted and floated a great many mining corporations?
A. Not a great many, some.
Q. Some. Have you been fortunate enough in your business transactions to have people deed you mineral rights for nothing?
A. I don't think so, not to my recollection.
Q. This is the first contract then that you have ever been fortunate enough in obtaining on such liberal terms?
A. May I state here, bearing upon your line of questions——
192 Mr. JACOBS: I withdraw the question. Never mind the discussion. Well go ahead.
A. That during the time Mr. Van Dyke came to me it was panicky time and money was scarce, I knew that, all knew that. Mr. Van Dyke represented to me that he had an opportunity of making money out of a townsite in this camp, and to him, as he represented, it was to be advanced for the ground. Upon my part it was a hardship to dig up the money to pay for the property——
Q. You mean a personal hard-ship or a corporation?
A. Personal, because I was at the head of those concerns, and in view of the conditions I can not say that the minerals were gotten for nothing.
Q. Now to take up another line of examination: This first two thousand dollars was advanced out of the funds of the Live Oak Development Company?
A. Yes, sir.
Q. As the voucher says, for the benefit of the Live Oak Development Company? That is true, isn't it?
A. Let me see the voucher?
Q. Your exhibit one for identification. It is now in evidence I believe (hands exhibit to witness) "The above account is correct and expense was incurred for the benefit of the Live Oak Company. Approved for payment H. B. Hoveland." That is correct isn't it?
A. Yes, sir.
193 Q. That was two thousand dollars invested for the benefit of the Live Oak Development Company?
A. So it states.

Q. Is that correct?

A. Yes, sir.

Q. In these panicky times you saw where this investment of two thousand dollars would be a benefit to the Live Oak Development Company, did you?

A. I presumed it would be a benefit and I assumed the authority to give it on that theory. It was a loan. The money was paid back. Cash was paid back to the Live Oak. It was taken up.

Q. It was also a benefit to Henry B. Hoveland, wasn't it?

A. In what respect do you mean?

Q. The advance of this money?

A. I don't know what you refer to.

Q. You intimated this whole deal, the furnishing of this seventeen thousand dollars to Mr. Van Dyke was a philanthropic movement on your part to Mr. Van Dyke. You anticipated a mutual benefit did you not from this deal?

A. I contemplated the share holders should come in with him in the Cordova and might possibly have some benefit out of those minerals in years to come if we should develop a company down there.

Q. Now when you loaned this two thousand dollars—
194 exhibit one for identification—you told Mr. Van Dyke that that would be assigned to the new company and the new company would take that over as soon as they had sufficient funds?

A. I am not very clear on that. I remember——

Q. That is your recollection now, is it not?

A. Yes, sir.

Q. You also had the same understanding with reference to the five thousand dollars which you loaned before the Cordova Copper Company was organized?

A. That was paid out while I was in New York and I did not see Mr. Van Dyke.

Q. That was paid out of the funds of the Live Oak?

A. We had no conversation concerning it.

Q. But that was paid out of the funds of the Live Oak, was it not?

A. Let me see that voucher, I wish to answer that question correctly.

Q. (Hands voucher to witness.)

A. Yes, sir, this appears to be advanced by the Cordova Copper Company.

Q. Was it originally advanced to the Cordova Copper Company or by the Live Oak and this voucher signed to the Cordova?

A. I can not remember that. It seems to me as if it were paid out by the Cordova Copper Company.

195 Q. In your testimony in direct examination you stated it was paid out by the Live Oak, did you not?

A. I did not make that positive statement.

Q. What was the date of the organization of the Cordova Copper Company?

A. I can not give that. It was in the Spring of 1909.

Q. Wasn't it after this money was paid; after March 8, 1909?

A. I can not say that. I could get the records to see that.

Q. Let me see this complaint just a moment. Now all of this money, this two thousand dollars, that was paid by the Cordova Copper Company to the Live Oak as consideration for the assignment of the two thousand dollar voucher, and the five thousand dollars that was subsequently advanced to Mr. Van Dyke, and the last ten thousand dollars, was all funds of the Cordova Copper Company?

A. Yes, sir.

Q. It was money that was obtained by the Cordova Copper Company through the sale of its stock, was it not?

A. Yes, sir.

Q. So this money that the Cordova Copper Company advanced to this defendant was money that had been obtained from the stock holders of the Cordova Copper Company who had purchased stock on the faith of the representation that the Cordova Copper
196 Company had the mineral rights in the ground of the Miami Townsite Company belonging to this defendant. Isn't that true?

Answer. In part.

Question. Was there any money that did not come from the sale of stock?

Answer. No, but there was other property.

Question. Then the Cordova Copper Company used the property of the defendant for the purpose of obtaining money to loan to the defendant under the terms of that contract did they?

Answer. Well, that would be a matter of theory I suppose to get at that. I can not state.

Question. Yes, it is theory, and also a fact isn't it?

Answer. I could not prove it.

Question. No, but you could not disprove it, could you?

Answer. I would not start out to either prove or disprove it.

Question. Do you remember receiving a letter from the defendant Van Dyke dated the 28th day of May, 1909?

Answer. I do not recollect it now, possibly I have a copy.

Question. Perhaps if I will show you the letter Mr. Hoveland you will recall it?

The COURT: Exhibit E, Mr. Jacobs.

Mr. JACOBS: Exhibit E, thank you. You have the contract there in your hands. Now, after this two thousand dollars was paid
197 by you to Mr. Van Dyke in Duluth, you had no further discussion as to this contract, did you?

Answer. As to the draft of contract which is submitted as an exhibit do you mean, or——

Question. Yes, or any other contract referring to these mineral rights?

Answer. I do not recollect any discussion of the deal until January, 1910.

Question. Down at the hotel. That is the night you went to bed while Mr. Van Dyke was there?

Answer. Yes, sir.

Question. I call your attention to plaintiff's exhibit E, page seven of that exhibit, and ask you if you recall having read this note and letter, if you received the letter: "I shall send you a copy of my contract as you request. When in Duluth I had a tentative contract drawn along the lines we discussed. I believe I left a copy with you, but as you may not have it I will send you the original copy, it contains my plan for trading my mineral ground for stock and other considerations as mentioned in the contract." Do you recall that?

Answer. Yes, sir.

Question. You received that letter?

Answer. I received this letter.

Question. And you received the contract enclosed?

A. He mentions, probably referred to another contract here.

Q. That is the tentative contract?

A. Tentative contract, yes.

Q. Then he refers to the contract, tentative agreement, as expressed there?

A. Yes.

Q. Now you received that?

A. Yes.

Q. Together with this letter?

198 A. I don't recollect whether that tentative contract came in a separate envelope or wrapper.

Question. But you did receive it?

Answer. Yes.

Question. That was about the last of the month of May, 1909, was it?

Answer. Yes, dated the 8th of May, but I may not have seen it for a while for I am away from the office a great deal.

Question. Well, when you received that contract enclosed in that letter did you reply to the letter or address Mr. Van Dyke in reference to the contract?

Answer. I don't recollect whether I did or not. I believe not.

Question. Think not?

Answer. Yes, sir.

Question. You knew from receiving that contract that that was the understanding that Mr. Van Dyke claimed existed between you and the Cardova Copper Company and himself in reference to this property, didn't you? That is, you knew he claimed that to be the contract?

Answer. I presumed that that was his claim.

Question. And you did not answer his letter and you did not communicate with him in reference to the terms of that contract after receiving it in that letter?

Answer. No.

Question. Just a moment. And after you received that contract, and supposing, as you now say you did suppose, that that was

199 Mr. Van Dyke's understanding of the agreement between you, you caused the other ten thousand dollars to be paid to

him by the Cordova Copper Company, did you not? Answer that yes or no, if you please?

Answer. May I——

Question. You may answer yes or no.

Answer. Yes, I caused that to be paid. I wish to add in there, at his request.

Jury admonished and recess taken for ten minutes.

After recess. Roll call of jury. All present.

Question. Now, Mr. Hoveland, in this agreement with Mr. Van Dyke, this agreement you stand upon, is the one you made in Duluth in January, is it?

Answer. January, 1909, yes, sir.

Question. 1909. And that is the only agreement?

Answer. As far as I am concerned.

Question. As far as you are concerned. The Cordova Copper Company?

Answer. Yes, sir.

Question. You have been the president of the Cordova Copper Company from the time of its inception up to the present time have you?

Answer. Yes, sir.

Question. Well, in that agreement that you had with Mr. Van Dyke at that time there was no stated way mentioned by which he was to repay this money. It was unqualified in addition to the agreement to pay it at certain time according to vouchers, wasn't it?

200 Answer. This voucher was——

Question. That is true isn't it? That is the agreement unconditionally in that voucher to pay that money on a certain date?

Answer. Yes, sir.

Question. Now I want to call your attention, sir to plaintiff's exhibit F, which is your letter of August 19th, 1909. I read from the third paragraph of the letter on Page one, in which you say to Mr. Van Dyke: "In one letter you raised the question as to why we should be interested in the sale of lots, but I believe you will concede that our interest is natural inasmuch as your plan proposed to repay the money we advanced from the sale of real estate"?

Answer. That is true.

Question. Look at that letter. Now do you wish to correct your statement that you made to the jury a moment ago that the payment of that money, repayment was unconditional as specified on those vouchers?

Answer. No, sir.

Question. What plan do you refer to in that letter?

Answer. He outlined. I asked him how he proposed to raise the money—acquire the money to pay back this money to me, and to our company, and he said he expected to put on the townsite soon and by the sale of lots he expected from the proceeds of the sale of lots to meet this, but that was not the condition entering into the vouch-

ers, that was his explanation to me as to how he would get the money to pay back the notes.

201 Question. It was a condition, however, of that contract that he presented to you in January in Duluth, was it not? The one you had in your hand there a few moments ago, exhibit D?

Answer. I presume it was. I am not certain about whether this contract is exactly similar to the one on exhibit or not.

Question. But you did state to me in cross-examination that you thought there was such a clause in that contract did you not?

Answer. Yes, I will say I think there was.

Question. And the terms and conditions of that contract were discussed with you in January in Duluth?

Answer. Of that portion of the contract?

Question. All the terms?

Answer. Of that portion of the contract which has been filed here, yes.

Question. Then in August you write him this letter and tell him you are interested in the sale of lots because that is the plan of repayment proposed by him. When did he propose it to you, Mr. Hoveland?

Answer. In August I wrote him that letter——

Question. When? Wasn't it up in Duluth in January before that two thousand dollars were paid?

Answer. Yes, sir.

Question. That was what you referred to?

Answer. Yes, I presume.

Question. Then you had reference to the terms of that con-

202 tract when you wrote him in August, did you?

A. No, sir.

Q. Why did you write that letter?

A. Because he had not paid this other indebtedness when due.

Q. That is the reason you told him the money was repayable out of the lands?

A. That is the reason I was interested in the sale of lots.

Q. That is the only reason you have for the explanation of that letter?

A. Yes, sir.

Q. The only one?

A. Yes, sir.

Q. Now when did the Cordova Copper Company cease to operate that ground in the Eureka Group and the Miami Townsite?

A. I can not recollect that.

Q. Why did they cease?

Counsel for plaintiff objects to the question upon the ground that it is immaterial and not proper cross-examination.

Question withdrawn.

Q. Did they not cease to operate——

Mr. NAVE: I object to whether they ceased——

203 Mr. JACOBS: I have not finished the question.

Q. Did they not cease to operate that ground because of a report of your manager—referred to by Mr. Van Dyke as "Our Hibernian Chief," Mr. McCarthy—to the effect that the property would not justify further exploration?

Mr. NAVE: Is that the end of the question?

Mr. JACOBS: Yes, sir.

Mr. NAVE: I object to the question upon the ground that it is immaterial.

The COURT: This operation of the Eureka Group so far has not entered into this case. The objection will be sustained.

Mr. JACOBS: We reserve an exception to your honor's ruling.

Question. Now, you never demanded of Mr. Van Dyke a conveyance of those mineral rights in the Miami Townsite property, did you?

Answer. I did not need to, he has written me letters in which he has indicated that he was carrying those minerals for me.

Question. That he was carrying those minerals for you?

Answer. Yes, sir.

Question. You did not deem that a title to the property did you?

Answer. No

Question. Or a basis for a title?

Answer. No, that is not the basis of this action.

Question. No, not at all——

204 Answer. It is the basis for title when we finally acquire the mineral rights.

Question. By a conveyance from Mr. Van Dyke?

Answer. By execution of our agreement.

Question. That agreement you refer to was not in writing was it?

Answer. No, sir, not other than represented by vouchers signed by him.

Question. But as far as his agreement to convey to you the mineral rights, there was no writing to that effect was there?

Answer. Not at that time?

Question. Or at any time?

Answer. It is in many letters he has written since.

Question. Have you those letters?

Answer. They are in evidence. That seems to me another line. We are asking for the repayment of cash.

Question. It seems to you what?

Answer. I say another line of argument. We are asking for the repayment of cash.

Question. I don't want to argue with you. Now I call your attention to plaintiff's exhibit A. In this contract submitted to you by Mr. Van Dyke in January, 1909 at Duluth, page two, page three rather, third paragraph, "The party of the second part under this contract;" that is Mr. Smith, your associate, "His heirs and assigns agree to do all necessary assessment and other work, and bear

205 all expenses in order to secure patents for all mining claims hereinbefore set forth." That was in the agreement Mr. Van Dyke submitted to you in January in Duluth?

Answer. I don't know. I haven't admitter that was an exact copy of the contract.

Question. You haven't intentionally admitted anything in reference to this contract?

Answer. Admitted anything?

Question. Yes.

Mr. JACOBS: I withdraw that.

Question. You say you don't recollect that?

Answer. No, I don't recollect specifically.

Question. If Mr. Van Dyke testifies, as he has testified, that he presented to you an exact copy of that exhibit in January, you would not say he did not would you?

Answer. No, sir.

Mr. NAVE: I object to him answering as to the credibility of their witness——

The COURT: He has answered the question.

Question. Then you may have discussed——

Mr. NAVE: Just a moment. I am objecting to Mr. Jacobs putting Mr. Hoveland in the humiliating position of proceeding against the credibility of Mr. Van Dyke.

The COURT: As the record at present stands there is nothing for the court to decide.

Question. You did discuss, did you not, that feature of the proposed contract that you or your assigns did agree to do all the
206 necessary assessment and other work and bear all necessary expenses in order to secure patents for the mining claims?

Answer. I think I can say Mr. Van Dyke argued that feature in connection with the plan he there submitted.

Question. Now, I ask you, as a mining promoter, and one with vast experience in buying and acquiring many options on mining property, if it is not customary for the person taking an option on mining property to agree to do the assessment work and prosecute the application for patents upon the property? That is the ordinary process is it not?

Counsel for plaintiff objects to the question upon the ground that it raises a collateral matter and is not proper cross-examination.

Colloquy between court and counsel.

Question withdrawn.

Question. Is it not customary, and has it not been customary with you, Mr. Hoveland, in taking options upon mining property to agree in your contracts to do the assessment work and prosecute the application for patents?

Same objection.

Objection overruled.

Answer. It is customary.

Question. Did you not agree with Mr. Van Dyke to do the assess-

ment work on the mining claims included in the Miami
207 Townsite ground that he had under option, and bear the general expense in surveying and engineers' work and to prosecute the claims or application for patents for these mining claims?

Answer. That is in connection with the mineral rights?

Question. Yes?

Answer. Another feature——

Question. You did, did you not?

Answer. If the court asks me to reply to that I shall.

Question. The court has ruled that I am entitled to that answer.

The COURT: There is no objection to your answer.

Answer. Did I agree?

Question. Yes, sir?

Answer. Yes, and did the work.

Question. And then your manager charged Mr. Van Dyke for the work and Mr. Van Dyke advanced the money to your manager did he not?

Question objected to by counsel for plaintiff upon the ground that it is not proper cross-examination.

Mr. JACOBS: I will withdraw that question at this time and go after that later.

Question. Well, that agreement you made has this provision on page three of the contract: "The party of the second part, his heirs and assigns, agree to do the assessment and other work and bear all the expenses in order to secure patents hereinbefore set forth."

Wasn't this portion of the contract agreed to by you?

208 Answer. I did not agree to that. I agreed to what I have stated I agreed to?

Question. That is the same is it not?

Answer. I do not know.

Question. Read it and see?

Counsel for plaintiff objects upon the ground that the jury can not look and determine whether it is the same.

The COURT: I think the witness has a right to testify to what he agreed to.

Colloquy between court and counsel.

Answer. I think there is this difference: This requires the payment of expense for patents and patenting of ground. That, we always hesitate to agree to do, not knowing whether we shall be able to obtain patent, and in fact, bearing upon that feature, when Mr. Van Dyke was in Duluth he represented, and I gained the impression, that the ground he had was clear in title and without any controversy, at least he did not notify me that there were troubles. He said the townsite would go on soon and that he would sell lots soon. It turned out later that property conflicts and irregularities developed in connection with that property and the management of the Cordova Copper Company gave all their assistance they could. Their whole organization was at the disposal of Mr. Van

Dyke in clearing up the titles and surveying the claims and assisting him in acquiring sound titles to his ground. We did not overlook that feature. We did what we could to assist Mr. Van Dyke in removing the confusion he got into. Mr. Van Dyke's letters
209 will show that from time to time he brings up excuses of troublous titles as the reason for not putting on the townsite.

Q. Mr. Hoveland in your direct-examination you responded to a question propounded by Judge Nave in referring to the contract that was marked plaintiff's exhibit A, that you had never seen this agreement until you gathered it up among your papers for this case?

A. No, sir, I did not make that statement.

Q. You did not make that statement?

A. No, sir.

Q. That was my understanding. I am glad to know that I am mistaken. Now you wrote to Mr. Van Dyke demanding repayment of this money many times?

A. Several times, yes, sir.

Q. As you testified in your direct-examination "A hundred times"?

A. No, sir, I did not testify to that.

Q. You did not testify to that?

A. No, sir.

Q. And that your secretary, Mr. Smith, had written a hundred times?

A. No, sir.

Q. What did you say?

A. If you will have the stenographer refer to the notes——

Mr. JACOBS: Very well. Refer to your notes Mr. Re-
210 porter——

Mr. NAVE: I can correct Mr. Jacobs here. He said "A number of times".

The COURT: I think, Mr. Jacobs, he said a number of times.

Q. Then it was a number of times instead of a hundred times?

A. Yes, sir, I can say that.

Q. A number of times?

A. Yes, sir.

Q. Now you did testify that Mr. Van Dyke never demanded this eleven thousand and some odd dollars set up in the cross-complaint and counter claim in this action of you and the Cordova Copper Company before this suit?

A. I think I did, yes, sir.

Q. Well, during all this time you were operating the Cordova property, Mr. McCarthy was your manager or manager for the company?

A. Yes, sir.

Q. He was authorized to act and speak for the company in matters out here was he not?

A. Yes, sir.

Q. Now, you met Mr. Van Dyke at the Dominion Hotel on one of your visits to Globe in January, 1910, did you?

A. Yes, sir.

Q. I refer now to the conversation Mr. Van Dyke had
211 with you at the Dominion Hotel at which you retired during his presence, and in which, he says, in violation of all the rules of hospitality that you retired in his presence. Do you recollect that occasion?

A. I do.

Q. He is correct about that statement, is he?

Mr. NAVE: I object to him asking this witness to pass upon the veracity of another witness. That is for the jury to determine and not Mr. Hoveland.

Question withdrawn.

Q. Did you retire in his presence upon that occasion?

Question objected to by counsel for plaintiff upon the ground that it is immaterial and not proper cross-examination.

Objection sustained.

A. I can express my opinion that I believe hospitality ceases at about two o'clock in the morning or 2:30.

A. And ceased on that occasion did it? Now, Mr. Hoveland, didn't the defendant, Mr. Van Dyke, attempt to discuss with you that night his account against the Cordova Copper Company, money advanced by him? He attempted to didn't he and you would not lister to him?

A. What account?

Q. A claim—money that he claimed to have against the Cordova Copper Company for money——

212 Mr. NAVE: I object until it becomes an issue in this case.

Mr. JACOBS: He brought that out in direct examination.

The COURT: Not on this new matter.

Question. Now I asked him if he did not, at the Dominion Hotel in January, on the night you withdrew your hospitality at two o'clock in the morning and retired, attempt to discuss with you a claim he said he had against the Cordova Copper Company for money advanced?

Answer. What claim?

Counsel for plaintiff objects upon the ground that it is not an issue.

The COURT: At this time the objection will be sustained.

Colloquy between court and counsel.

Question. Did he ever demand any money of you except this seventeen thousand dollars?

The COURT: I think it is the wrong time to go into this matter. That was not brought out in direct response anyway. I think the objection is well taken and I will sustain it.

Mr. JACOBS: I reserve an exception.

The COURT: Very well.

Question. Now, Mr. Hoveland, you know one Hoval A. Smith, do you not?

Answer. Yes, sir.

Question. He was your partner and associate in mining deals for a long time?

Answer. He was a partner of mine, yes, sir.

Question. He was interested with you as a partner in the organization of this proposed Cordova Copper Company was he? I will withdraw that.

213 Question. He was a partner at the time of these negotiations between you and Mr. Van Dyke?

Question objected to by counsel for plaintiff upon the ground that it is not proper cross-examination.

The COURT: He can answer yes or no. It is preliminary.

Answer. He was.

Question. He was equally interested in a like way with you in forwarding the Cordova Copper Company and acquiring the mineral rights in the Miami Townsite Co.?

Mr. NAVE: Same objection. I think I had better press the objection because of the fact until I can get from Mr. Jacobs an avowal putting in Mr. Hoval A. Smith's statement along with what he has seen fit to put in I can't let him put in one side. Further it is not proper cross-examination.

Mr. JACOBS: It is preliminary and I will show its materiality and lead up to cross-examination following this question.

Objection overruled.

Question. Did you not know as a matter of fact, Mr. Hoveland, that your partner and associate, Mr. Hoval A. Smith, had, within two weeks prior to the time Mr. Van Dyke submitted this contract to you in Duluth, offered Mr. Van Dyke ten thousand dollars for the mineral rights in the townsite property company, cash, and that Mr. Van Dyke refused it? Don't you know that to be true?

Answer. No, sir.

Counsel for plaintiff objects to the question upon the
214 ground that it is neither material or proper cross-examination.

The COURT: I can not see the materiality of it.

Mr. JACOBS: It is material as far as the absurdity or improbability that this defendant would refuse from the partner of this very man ten thousand dollars in Bisbee for these mineral rights, cash, and then go up to see Mr. Hoveland in Duluth and give them to him for a loan. That is the materiality of it.

Colloquy between court and counsel.

Question read.

Mr. NAVE: I move that the answer be stricked from the record upon the ground that it is immaterial.

The COURT: It may be stricken.

Mr. JACOBS: Exception.

Question. Do you know a man named Dwight Woodridge?

Mr. NAVE: Were your questions as to partnership a foundation for that question?

Mr. JACOBS: What question?

Mr. NAVE: If the court please, I move to strike all of the evidence given by this witness with respect to his relations with Hoval A. Smith upon the ground that it now proves to have been improperly admitted in evidence over my objection. Your honor will recall I objected and your honor overruled the objection only upon avowal they were preliminary. They now appear not to be preliminary and I now move that it be stricken out.

215 Mr. JACOBS: If the court please, this objection is entirely too indefinite.

The COURT: Regarding whether or not Mr. Smith and he were partners, starting out with?

Mr. NAVE: Yes, sir.

The COURT: Very well, in view of what has developed I can not see where it is material at all. The motion will be granted.

Mr. JACOBS: Exception.

Q. Did you say you know Dwight Woodward?

A. Yes, sir.

Q. Is he a Duluth man?

A. He used to live in Duluth, yes, sir.

Q. Interested in mining business?

Question objected to by counsel for plaintiff upon the ground that it is immaterial what Mr. Woodridge was interested in and is not proper cross-examination.

Question withdrawn.

Q. You had a conversation with Mr. Van Dyke in Duluth in January, 1909 in reference to Mr. Dwight Woodridge, did you not?

A. I can not say that I did.

Q. You had sufficient conversation with Mr. Van Dyke in reference to Dwight Woodridge on that occasion to know that Mr. Dwight Woodridge was dealing with Mr. Van Dyke to secure the

216 mineral rights in the Miami Townsite Company, did you not?

Counsel for plaintiff objects to the question upon the ground that it is utterly immaterial and not proper cross-examination.

The COURT: I can not see the materiality.

Mr. JACOBS: May it please the court, all of the conversation that occurred between Mr. Van Dyke and Mr. Hoveland in Duluth on that meeting is proper cross-examination.

Colloquy between court and counsel.

The COURT: Where is it material?

Mr. JACOBS: It is connected with this very transaction. Here are these two gentlemen engaged in a proposed mining deal——

The COURT: This man and Mr. Van Dyke?

Mr. JACOBS: This gentleman, Mr. Hoveland, and Mr. Van Dyke. Now the very thing that prompted this man to pay this two thousand dollars hurriedly when about to leave for New York, was be-

cause he knew Mr. Van Dyke was engaged with other parties for the sale of that property and he wanted to secure it. Now the conversation he had with Van Dyke in reference to this property and what he was intending to do with the property with the other parties is a part of this conversation in reference to this transaction
217 and is relevant and material and we are entitled to it.

Further colloquy.

The COURT: He may answer the question.

Question read.

Question withdrawn.

Q. What, if anything, did Mr. Van Dyke tell you in that conversation in reference to any agreement or proposed agreement that he had with Mr. Dwight Woodridge at that time for the conveyance to him of the mineral rights in the Miami Townsite Company?

Question objected to by counsel for plaintiff upon the ground that Mr. Woodridge has nothing to do with Mr. Hoveland in this matter, and upon the further ground that it is not proper cross-examination on any matter brought out in chief.

Colloquy between counsel.

Question withdrawn.

Q. Isn't it true that you paid that two thousand dollars to Mr. Van Dyke in January, 1909 in Duluth because you wanted to tie and bind that contract to secure the mineral rights for the Cordova Copper Company, knowing that other parties were negotiating with Mr. Van Dyke for the ground? Isn't that true?

A. It is not true.

Q. Then you did not know other parties were dealing with him for the ground? Is that true?

218 Question objected to by counsel for plaintiff upon the ground that it is immaterial and not proper cross-examination.

Objection overruled.

Q. What was your answer?

A. I did not know that others were negotiating for that property, except that Mr. Van Dyke told me that others were negotiating. Later in the conversation he mentioned Mr. Woodridge negotiating for it, and added that he preferred to turn the property to our crowd. Nevertheless he did not give me the price offered him. He gave me no conditions offered by the other parties for the ground.

Q. You knew nothing about the terms?

A. No, sir, nor was I interested. The deal was made for this property and Mr. Van Dyke was satisfied with the course of this property and satisfied with turning it to myself and associates rather than to Woodridge on the terms Woodridge had offered. The terms, as I stated, I do not know. The check was paid shortly before I left for New York, as I remember it, and no negotiations occurred after the two thousand dollars was paid, so Mr. Van Dyke had all the opportunity to turn this property to Mr. Woodridge and he chose not to do so. Now that is about as concise a statement as I can make.

Q. Said he would rather deal with your people?

219 A. Nor was that any inducement for me to put in this money. In fact, I told Mr. Van Dyke if he wished to go ahead with other parties that, of course, was his entire privilege, which it was.

Mr. NAVE: I ask the court to bear in mind these answers are over my objection so when Mr. Jacobs attempts to go into it with Mr. Van Dyke later on that I shall not be held to the rule that I can not object to Mr. Van Dyke going into it after it has gone in over my objection.

The COURT: Very well.

Mr. DAVID L. FAIRCHILD, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. NAVE:

Q. Mr. Fairchild state your full name to the jury?
A. David L. Fairchild.
Q. You reside where?
A. Duluth.
Q. Minnesota?
A. Minnesota.
Q. What relation, if any, do you sustain to the plaintiff, Cordova Copper Company?
A. I am treasurer and one of the directors.
Q. How long have you sustained that relation?
A. Since the organization; that is outside of the first board of directors.
Q. Were you in Globe, Arizona in December, 1908 at about the time, at the time that the option on the Eureka Group property operated by the Cordova Copper Company was made?

220 Answer. I was.

Question objected to by counsel for defendant upon the ground that it is irrelevant and immaterial under the contract entered into between Mr. Van Dyke and Mr. Hoveland.

The COURT: What is the materiality?

Mr. NAVE: The next question will show.

The COURT: You may ask this question.

Question. At that time did you have a conversation with the defendant, Mr. Van Dyke.

Answer. I did.

Question. With respect to the matter of acquiring and assisting Mr. Van Dyke in floating a townsite. This townsite at Miami?

Answer. Yes, sir.

Question. State what Mr. Van Dyke said in that conversation?

Question objected to by counsel for defendant upon the ground that it is irrelevant and immaterial as taking place long before the suit.

The COURT: What is the materiality, Mr. Nave?

Mr. NAVE: The answer will tend to show what the agreement was. Now if we had a written agreement that written agreement would merge all prior treaties, that is true, but we have not seen any written agreement.

Colloquy between court and counsel.

Objection overruled.

Exception by defendant.

Question read.

Question. With respect to this matter that is, of course?

221 Answer. This conversation took place in the Dominion Hotel. There had been——

Mr. JACOBS: I object to it until it is first ascertained the time, place and parties present.

Question withdrawn.

Question. About when?

Answer. About the twelfth of December, 1908.

Question. And what time of the day? Do you recollect?

Answer. I think in the evening. I am not sure.

Question. Who else was present, if you recollect?

Answer. I think Hoval A. Smith and Walter A. Barrows.

Question. What did Mr. Van Dyke say about this company at that time?

Answer. At that time he stated that he was anxious to raise money in order to take care of some option which he had or was about to get upon property in the Miami District, where he proposed to float and sell a townsite. I do not know whether the proposal came from Mr. Van Dyke or Mr. Hoval A. Smith as to the terms upon which he would sell this property, but if it came from Mr. Smith it was acquiesced in by Mr. Van Dyke. The price he stated would be ten thousand dollars; that was necessary for him to get them. After that we would acquire the mineral rights and he would repay the money. I remember particularly asking Mr. Van Dyke the question again and he agreed to it.

222 Question. What question?

Answer. The question if he meant he would sell these mineral rights and return the money for the ten thousand dollars, and he said yes.

Cross-examination.

By Mr. JACOBS:

Question. Now, you say that Mr. Walter Barrows was present at that time?

Answer. I think that he was.

Question. Was this meeting by appointment or just casual meeting?

Answer. Casual meeting?

Question. Casual meeting?

Answer. Yes, sir.

Question. Then you were not there at the time for the purpose of interviewing this defendant, Mr. Van Dyke, with reference to that matter?

Answer. No, sir.

Question. Was that the purpose of the meeting?

Answer. It might have been; that is, as far as I was concerned.

Question. In as far as you were concerned?

Answer. No, sir.

Question. You had not been instructed or requested by Mr. Hoveland or any officer of the proposed Cordova Copper Company to interview Mr. Van Dyke to the end that you might secure a contract for the mineral rights in the Miami land?

Answer. No, sir.

223 Question. How did you happen to meet with Mr. Van Dyke there?

Answer. Why, Mr. Van Dyke had been around more or less ever since we had been in the city.

Question. Had been around together.

Answer. He had been around the hotel.

Question. And you were together? How long had you been here at that time?

Answer. I am not sure whether I came here that morning. I am not certain about the date. It was about the twelfth or thirteenth.

Question. You don't know the exact date. Was it before you had this conversation with Mr. Van Dyke?

Answer. It might have been.

Question. Had you been around town?

Answer. No.

Question. Been out over the Miami company?

Answer. No.

Question. Confined your operations right around the Dominion, right around the hotel?

Answer. Yes, sir.

Question. And this was a casual remark on the part of Mr. Van Dyke?

Answer. No.

Question. Wasn't casual?

Answer. No. Casual meeting.

Question. Casual meeting?

Answer. Yes, sir.

224 Question. And what was the conversation being discussed at the time Mr. Van Dyke made the remark? What was the subject of the conversation?

Answer. I suppose the conversation probably was about matters that related to this same project of his.

Question. Who introduced the conversation?

Answer. I am not sure, but undoubtedly Mr. Van Dyke.

Question. Did he address Mr. Barrows?

Answer. No, I think it was addressed to Mr. Smith.

Question. Mr. Hoval A. Smith?

Answer. Yes, sir.
Question. You did not participate in this conversation did you?
Answer. Except to the extent that I have before testified.
Question. Now what was the extent of your participation?
Answer. That is I asked him the question as to his offer.
Question. What did you say to Mr. Van Dyke?
Answer. What did I ask him?
Question. Yes?
Answer. I don't know whether I can repeat it word for word.
Question. What did Mr. Van Dyke say to you?
Answer. Yes.
Question. You said something to Mr. Van Dyke, you
225 don't know what it was, and Mr. Van Dyke answered yes. Is that it?
Answer. No, I remember the substance of it.
Question. You said something to Mr. Van Dyke—you can not tell what it was, and Mr. Van Dyke answered yes?
Answer. Yes, sir.
Question. That is all that transpired at that meeting is it not?
Answer. No.
Question. You said something else? What did you say?
Answer. You want the exact words?
Question. Yes.
Answer. As I testified before, I am very doubtful about being able to give it.
Question. Your memory is vague on that at this time?
Answer. Not as to the substance.
Question You have discussed this matter with Mr. Hoveland recently?
Answer. Yes, recently.
Question. Discussed it with him today did you not? Down here in the building, in the court house. Rather an animated discussion with him at that time?
Answer. It might have appeared so.
Question. As to what your testimony was to be in this case?
Answer. No, I don't think it was about that.
226 Question. And you realized the importance, the necessity of remembering that conversation with Mr. Smith——
Answer. With Mr. Van Dyke?
Question with Mr. Smith.
Answer. With Mr. Smith and Mr. Van Dyke.
Question. You said something to Mr. Van Dyke and Mr. Van Dyke turned around to Mr. Smith and said yes?
Answer. No, he turned to me and said yes.
Question. Didn't you say a moment ago that Mr. Van Dyke made this proposiion to Mr. Smith?
Answer. I did.
Question. What did he say to Mr. Smith?
Answer. Well, as I said before, I don't think I can give the exact words, but I can give the substance of it.

Question. You don't know, as a matter of fact, what Mr. Van Dyke said to Mr. Smith on that occasion, do you?

Answer. Not word for word.

Question. That was about three years ago wasn't it?

Answer. A little over three years ago.

Question. What did Mr. Smith say to Mr. Van Dyke after this statement had been made to him?

Answer. Well, I don't know that there was any further discussion as to the subject then. The proposition was neither accepted nor rejected.

Question. Neither accepted nor rejected?

227 Answer. No, sir.

Question. Then the matter ended right there did it?

Answer. As far as I was concerned, yes.

Mr. JACOBS: I move to strike the testimony of this witness out on the ground that it is irrelevant and immaterial, and ask that the jury be admonished.

Mr. NAVE: I resist the motion.

Colloquy between counsel.

The COURT: The matter is before the jury anyway, and this motion to strike can be settled in the morning.

Mr. JACOBS: I want to ask this witness a question before he leaves the stand.

The COURT: Very well.

Question. Look at this Mr. Fairchild (hands telegram to witness)?

Answer. ——.

Question. That is all the conversation that occurred there in January?

Answer. January? This was in December.

Question. Oh, this was in December?

Answer. Yes, sir, I was not here in January.

Question. You have read this telegram from Hoval A. Smith have you?

Answer. Yes.

Question. You know the contents of this telegram don't you?

Answer. Yes.

Question. Do you want to change your testimony in any particular?

228 Answer. Not in the slightest.

Question. You don't want to change it?

Answer. Not at all.

Question. Regardless of what Hoval A. Smith may have said in this telegram you think you will let your testimony——

Counsel for plaintiff interposes an objection to the question upon the ground that it is hearsay.

Objection sustained as hearsay evidence.

Redirect examination.

By Mr. NAVE:

Mr. NAVE: As redirect examination I will offer in evidence this letter of Hoval A. Smith, which I ask your honor to read (Hands letter to the court).

Counsel for defendant objects to its introduction in evidence upon the ground that it is irrelevant, incompetent and immaterial, and upon the further ground that there is absolutely nothing in it in reference to this case.

Mr. NAVE: I confess the objection upon the ground simply that it is hearsay.

Mr. JACOBS: I will also confess objection to the telegram as hearsay.

Jury admonished and recess taken until 9:30 a. m., May 2nd, 1912.

After recess. Roll call of jury. All present.

The COURT: I believe there was a motion yesterday afternoon to strike the testimony of the witness Fairchild, and the court not being fully advised desired to take the matter over, and during that time the court has gone into it somewhat and the court at this
229 time feels that while it is in the record, he can not see that it really hurts or is of much benefit to either side, but having gone in, and the conversation having been addressed to one of the parties interested, plaintiff in this case, the court will let it stand.

Mr. JACOBS: We reserve an exception to your honor's ruling in the matter.

Mr. MIKE MCCARTHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. NAVE:

Q. Mr. McCarthy will you state your full name to the jury?

A. Mike McCarthy.

Q. What relation, if any, do you sustain to the plaintiff in this case?

A. I am manager of the Cordova Copper Company.

Q. How long have you been in that position?

A. Since the company was organized.

Q. In your capacity as manager did you receive at any time from Mr. Van Dyke a payment of moneys for the Cordova Copper Company?

A. Yes, there were several payments from Mr. Van Dyke on accounts that were running in our Western books.

Q. Did you receive a payment of five thousand dollars at one time?

230 A. Yes, sir, on March 19th, 1910 Mr. Van Dyke paid me five thousand dollars—to our company, five thousand dollars.

Mr. JACOBS: May it please the court, I object. If this is a portion of the plaintiff's case there is no question raised in the plaintiff's complaint or the answer to the complaint concerning this five thousand dollars. The only payment alleged in the plaintiff's complaint is some two thousand and some odd dollars, but nothing in the issues between the plaintiff and defendant on its main case as to the payment of any five thousand dollars. It seems to me this proof is out of order; that it is really a matter of proof on the part of the defendant in this case in his counter-claim, and for that reason we object to it at this time.

The COURT: I think the objection is well taken.

Mr. NAVE: If you concede the payment of this twenty five hundred dollars as pleaded in the complaint that ends it.

Q. At the time Mr. Van Dyke made that payment did he make any statement to you what should be done with it?

A. He said——

Mr. JACOBS: I object to what he said.

A. He paid me that money and I told him I would apply
231 that to the charges which were on our western books amounting to some $2,484. and some cents, and the balance of that five thousand dollars, amounting to $2,515. and some cents was to be applied to his account on the eastern books of seventeen thousand dollars which was advanced to Mr. Van Dyke through the eastern office. I wrote to Mr. Van Dyke a letter on April the 21st, I think the date is, calling his attention to the fact——

Mr. JACOBS: I object to that as not responsive.

Q. Will you produce the letter of April 21st, 1910? (Question addressed to Mr. Jacobs).

Mr. JACOBS: I have no record of having received or written any such letter.

Mr. NAVE: We offer the acknowledgment, copy, inasmuch as the original is not produced. Acknowledgment of the payment by Mr. McCarthy as manager of the Cordova Copper Company——

Mr. JACOBS: We object upon the ground that it is irrelevant, immaterial, incompetent and no foundation laid for its admission.

Mr. NAVE: Can you produce the original of this letter of April 21st, which I have just submitted to you?

Mr. JACOBS: No, I can not, at least I do not know where it is. My client tells me he has such a letter but he does not have it with him.

Colloquy between counsel.
232 Objection withdrawn.

The COURT: It may be received and marked plaintiff's exhibit U in evidence.

Exhibit U read to the jury by Mr. Nave.

Cross-examination.

By Mr. JACOBS:

Q. When was that payment made, Mr. McCarthy?

A. March 19th, 1910.

Q. Now you had a conversation with Mr. Van Dyke asking him for that month?

A. Yes, sir, I will say that I asked him for money several times.

Q. Money to apply on what?

A. To apply on our western accounts which were the book accounts in our western office of the Globe Consolidated, Live Oak and Cordova Copper Company; also to apply on the eastern account.

Q. Now the Globe Consolidated property had been merged in the Cordova property had it not?

A. Yes, it was a combination.

Q. And it was a part of the property operated and owned by the Cordova Copper Company?

A. Yes, sir.

Q. And when you spoke to Mr. Van Dyke about this particular money you asked him for this five thousand that was coming
233 to him, did you not? You knew there was five thousand dollars owing to him from the Miami Copper Company and you wanted that five thousand to apply on his account?

Question objected to by counsel for plaintiff upon the ground that it is immaterial and not proper cross examination.

Objection overruled.

A. Mr. Van Dyke told me he was to receive seventeen thousand dollars from the Miami Copper Company for a piece of property at—I can not state definitely the piece of property, but I think it was in the neighborhood of where the power house of the Miami Copper Company is located now.

Q. That was personal between Van Dyke and the Miami Copper Company?

A. Yes, sir, and this payment was to be made.

Q. How much? Five thousand?

A. I am not sure. I don't know whether payment of five thousand or simply all the payments; but he paid me five thousand dollars and at that time I understood from the money he received from the Miami Copper Company.

Q. Was the payment made on the same day you made the demand?

A. I won't say as to that. I made the demand probably several times, but he paid that day.

234 Q. Mr. Van Dyke paid it?

A. Yes, sir, he paid five thousand dollars.

Q. Now you will not change your testimony in this matter? You do not care to do you?

A. I don't think so.

Q. You don't wish to change any of your direct examination?

A. I don't recollect there should be any change in it; that is my recollection of the direct examination.

Q. And you don't care even on cross-examination— I don't want to go into details in the matter. I think you can testify that what you have said here is true?

A. As near as I can give it.

Q. You can not explain in more detail or make any clearer to the jury?

A. Not that I know of now. Probably on cross examination you might bring out some points I do not recollect that I would be willing to explain.

Q. How long before you received this five thousand was it you had this conversation with Mr. Van Dyke?

A. Mr. Jacobs I could not tell you. I spoke to him several times. We met frequently and I asked him for the money.

Q. You and Mr. Van Dyke have been upon friendly terms have you?

A. Up to that time we have been on very friendly
234*a* terms.

Q. Up to that time?

A. Yes, sir.

Q. I suppose the payment of that money caused the estranged relations?

A. No, sir.

Q. You still feel kindly towards him?

A. Is it necessary to state that?

Q. Yes, sir?

A. There are some differences between Van Dyke and I which personally I feel I can not entertain.

Q. At the present time there are some estranged relations between you?

A. I should say some differences.

Q. I am not asking about differences. You are not friendly with him at this time?

A. No, not particularly friendly.

Q. Now the last conversation you had with Mr. Van Dyke— When was the last conversation you had with Van Dyke in reference to this money before the money was received by you?

A. I don't know, sir, I could not tell you the last time.

Q. What day of the week or month?

A. I could not tell you.

Q. Two months?

235 A. I could not tell you.

Q. Might have been six months?

A. I say we met frequently and we talked about the matter.

Q. Now your mind is perfectly clear as to what was said, but you can not tell this jury whether it was a day, a week, a month, four months or six months when you had this last conversation with him before this money was paid?

A. No, sir, to be truthful I could not state the number of days or number of weeks. It might have been one day or two weeks.

Q. If this latter matter had been recent and became necessary

to establish the fact could you testify why you would not be able to recollect at this time if you ever had a conversation with him?

A. I think so.

Q. You just think that?

A. I am just relying on my recollection and belief what I think I would remember.

Q. Now, as a matter of fact, Mr. Van Dyke did not pay you that money did he?

A. I received the five thousand dollars.

Q. Answer my question. Mr. Van Dyke did not pay you that money did he?

A. You mean personally?

236 Q. I am asking you if Van Dyke personally paid you that money? Answer it yes or no?

A. I will state this: That money was paid to me——

Mr. JACOBS: I object to that, and I ask the court to instruct this witness to answer the question yes or no.

Q. Did Mr. Van Dyke himself pay you that money? Yes or no?

A. I think he did there in my office.

Q. In what form was that money paid?

A. That I can not recollect. It may have been in the form of a draft or check. Our records will show. I have not looked up those records.

Q. Mr. Van Dyke paid you that money in your office?

A. That is my recollection that he paid me or my clerk.

Q. Isn't your mind clear on that?

A. Our records will show.

Q. You do not know whether he paid you or your clerk?

A. I say it was paid our company to apply on our account.

Q. As a matter of fact that money was paid by Jerry Elliott, attorney for the Miami Copper Company, wasn't it?

A. I do not remember having any dealings with Mr.

237 Elliott of the Miami Copper Company at that time.

Q. Now, in your conversation with Mr. Van Dyke tell this jury just exactly what you told him you were going to do with that money, how you were going to apply it, and your language you used to him?

A. Mr. Van Dyke was in our office in the trust building, I recollect that, and I told him that I would apply that money and credit his account in the western books; that is, I would arrange to credit his account on the western books and would send the money to Duluth and the balance of the amount, after the western amounts had been paid, would be credited to his Duluth account.

Q. How did you know that?

A. Duluth account?

Q. Yes?

A. Why I understood that Mr. Van Dyke received from Duluth two thousand, five thousand and ten thousand.

Q. But that application was made in the manner you have testified, upon your own volition that that was proposed. The proposi-

tion you made Mr. Van Dyke was that the application of this payment was that of trust?

A. Yes, sir.

Q. And did not emanate from any officer?

A. No, sir.

Q. Then you did not receive any instructions from any officer of the Cordova Copper Company?

238 A. I understood from Mr. Van Dyke——

Q. You had not been instructed by any officer of the Cordova Copper Company as to the manner of the application that should be made with that payment at that time?

A. I will explain my position——

Q. Answer yes or no?

A. I think I can explain it——

Q. You can answer the question yes or no?

A. As manager——

Q. Yes or no?

A. Can't I say as manager?

Q. You can answer yes or no. Had you or had you not been advised by any officer of the corporation?

A. I was advised by the corporation to make those collections.

Q. Answer my questions?

A. I will. I was advised by the corporation to make those collections and those particular payments I was not instructed to make any application of those particular payments by any officer of the company.

Q. Why didn't you say so?

A. I have said so now, but I wanted to explain my position.

Q. You are the gentleman referred to as the Hibernian chief by Mr. Van Dyke are you not?

239 A. Well, whether I am chief or not, I am very pleased to be Hibernian.

Q. A very capable answer. We have many of the same character now amongst us. As a matter of fact Mr. Van Dyke was away from Globe at the time that money was paid wasn't he? The money was paid to you in his absence?

A. I don't remember that Mr. Jacobs.

Q. Say yes or no?

A. I can not say yes or no to that.

Q. Now what did Mr. Van Dyke say to you when you told him a week, or two weeks, or four months, or six months before this payment was made that you were going to apply it in the manner in which you have? What language did he use?

A. It is impossible for me to remember the language Mr. Van Dyke used.

Q. I presume he did say something?

A. He talked some. We talked several times about it, yes, sir.

Q. Now the only thing you remember clearly in this entire matter is the fact that sometime, possibly six months prior to the payment of this money you had a conversation with Mr. Van Dyke and you remember accurately the words you used to Mr. Van Dyke but you

have no recollection as to what Mr. Van Dyke said to you? Is that correct?

240 A. About this payment?

Q. Yes?

A. You see Mr. Jacobs we talked about it so many times I don't recollect. I would be more apt to recollect what I said to a man than what he said to me. Meetings were casual and frequent.

Q. Well now you and Mr. Van Dyke were along at the time this conversation occurred?

A. At any particular conversation?

Q. Well that particular conversation which occurred within the range of six months before this money was paid?

A. Mr. Van Dyke and I discussed this question in the presence of Mr. Hoval A. Smith and William Witt, and probably he and I—we discussed this question alone, I don't recollect that there were——

Q. Now Mr. McCarthy isn't it true that you went to Mr. Van Dyke and told him that the company was short of money out here in operating this mine, this Cordova property, and that you needed money for your payroll? You told him that didn't you?

A. I believe I told him we needed money, Mr. Jacobs, we did. I told him we needed money for our expenses. He was owing us several thousand dollars and I was calling on him to pay it. We had advanced Mr. Van Dyke personal money——

241 Mr. JACOBS: Just a moment. This long lengthy discussion I move to strike out. He has answered the question, may it please the court.

The COURT: Very well.

Mr. JACOBS: I move to strike out all after "I told the defendant we needed the money for our expenses." That is thoroughly responsive to my question and the rest is voluntary and not responsive

The COURT: Very well. It may go out.

Q. When you told the defendant that, Mr. Van Dyke said to you "I am not obligated to pay those accounts; that properly belong to the Cordova Copper Company" or words to that effect?

A. Mr. Van Dyke never made that statement to me.

Q. Or words to that effect?

A. Or words to that effect, and——

Q. You have answered the question. Just a moment. And did you not tell Mr. Van Dyke that it was all right you needed the money to pay these expenses and he could pay this money to you and then adjust the matter later with the Cordova Copper Company, or words to that effect?

A. I have do doubt but what I said that.

Q. But that he said that?

A. I have no doubt but I said that. My answer as you made it.

Q. I demand he state that?

242 A. I said my words to Mr. Van Dyke. I don't remember what I said. I remember something like this, I think in line with your question: That in making the payment he might have brought up some objection to it, and I said "Mr. Van Dyke,

all right, I will send this money to Duluth and any objection of that kind you will have to fix with Mr. Hoveland". I think I used those words. That was right——

Q. Now then, your memory is better on the subject?

A. I don't recollect——

Q. Nor. Mr. Van Dyke did object to the payment of that money?

A. There was never any objection made to me for the payment of the money to apply on the seventeen thousand dollars which Mr. Van Dyke got in Duluth—never.

Q. But there was some objection made by Mr. Van Dyke to you to applying this money in the payment of the western account?

Question objected to by counsel for plaintiff upon the ground that it is not proper cross examination.

Mr. JACOBS: All I am offering to show is the payment on this account.

Colloquy between counsel.

Objection overruled. He may answer it.

Mr. NAVE: I beg the court to remember it goes in over my objection. It is entirely satisfactory that it should go in, but
243 I do not want to be precluded from rebuttal.

Question read.

A. Mr. Van Dyke questioned some of the items of the western accounts, Mr. Jacobs——

Q. Pardon me. Will you answer that question yes or no?

A. Yes, sir.

Q. He did object?

A. Yes, sir.

Q. Now you have answered I am very much obliged to you?

A. Can I explain?

Q. You can when Judge Nave sees fit to examine you in redirect.

A. ——.

Q. Mr. Van Dyke told you after protesting against the — and objecting to the payment of some of those western accounts, that if you were hard up for money that he would advance you this money and then take up and settle with Mr. Hoveland, president of the company?

Question objected to by counsel for plaintiff upon the ground that it is not proper cross examination.

Objection overruled.

Colloquy between court and counsel.

Question read.

244 Q. Yes or no?

A. I feel like qualifying an answer there; that is, to say——

Q. All right?

A. He did say he would settle with Mr. Hoveland. At different times he said he would settle the money business with Mr. Hoveland.

Q. Did not Van Dyke object to the accounts and tell you, at your suggestion, that he would take this up and settle with Mr. Hoveland?

Same objection. Objection overruled.

Mr. NAVE: Perhaps it would save time if it might be understood that any cross examination on this line goes in over my objection.

The COURT: Very well. It goes in under objection.

Question read.

A. At my suggestion that he would settle——?

Q. Did not Mr. Van Dyke tell you at the time he objected to this payment of the western accounts, and after you had suggested to him that he might pay the money and take the matter up and settle with Mr. Hoveland, that he would advance you this money and would take the matter up in the future and settle the difficulty with Mr. Hoveland, or words to that effect?

A. He objected to some of the accounts as stated before and I told him to take it up and settle with Mr. Hoveland, and I
245 believe he said he would.

Q. But you did want him to advance this money at that time to pay your running expenses here?

A. I wanted him to pay me that money on accounts against him for the advance of money.

Q. And so to induce him to separate from this money you told him to pay the money to you and then he could take the matter up with Mr. Hoveland?

A. I had charge of these accounts and I said if he did advance the money he could take it up with Mr. Hoveland, and he and I spoke several times of taking up with Mr. Hoveland and settling the differences between us; but these accounts were between Mr. Van Dyke and I wanted him to pay the accounts and take them off our books and pay us the money.

Q. Then you had a conversation of that kind with him on numerous occasions in which he objected to the payment of some of these accounts and you advised him to take the matter up with Mr. Hoveland?

A. I did not.

Q. You said a moment ago——?

A. Yes, sir, I will agree to that. I did agree. I said all right then you take the matter up with Mr. Hoveland, what we want is money to pay our accounts.

Q. That occurred several times?

A. I don't know how many times.

246 Q. But you did say a moment ago——?

A. I did not state that, but I will say——

Q. Then Mr. Van Dyke was persistently objecting to the payment of these western accounts to you, wasn't he?

A. Not persistently.

Q. He objected several times?

A. He might, I won't say to that.

Q. When did you have the first conversation with Mr. Van Dyke in reference to the payment of this money?

A. As I stated before I haven't any idea when the date was—how long before the payments were made. We both lived here in the

community and we met frequently and talked about this matter several times.

Q. Well in these conversations which occurred several times Mr. Van Dyke questioned the payment of these western accounts in each, and told you that he did not think he owned this tract with Mr. Hoveland and wasn't obligated to pay that?

A. I don't remember that he did.

Q. Would you say he did not?

A. I would not say.

Q. But you did say a moment ago in cross-examination to me "Van Dyke never told me that he was not obligated to pay the accounts"?

A. No, sir.

Q. Didn't you tell me that?

247 A. No, sir.

Q. That he said he was not obligated to pay the eastern accounts?

A. No, sir.

Q. Now Mr. Van Dyke protested to you after this account had been applied in the manner that you have testified to the application of any money of that kind on the eastern account, did he not?

A. No, sir.

Q. Did you ever discuss the eastern account with Mr. Van Dyke?

A. I think I did casually, Mr. Jacobs.

Q. What was the conversation?

A. Oh, about the return of the money.

Mr. NAVE: Permit me to renew my objection in spite of the fact that it is in line with my former objection. It is not proper cross examination.

Question read.

Q. What occasion did you have to discuss that with Mr. Van Dyke?

A. My interest in the Cordova Copper Company to get the money back.

Q. Oh, yes, but you told the jury a moment ago you had never been instructed by any officers of the company to inform Mr. Van Dyke——?

248 A. True, probably, but I am a stockholder and manager of the company and had their interest at heart. I was interested in the return of the money they had loaned and that was my purpose in asking Mr. Van Dyke for the money and receiving it, and which I considered Mr. Van Dyke paid to the Cordova Copper Company.

Q. You knew nothing about the contract entered into between Mr. Hoveland and Mr. Van Dyke in Duluth in January, 1909?

A. Absolutely nothing.

Q. All you knew about Van Dyke being indebted to the Cordova Copper Company in the sum of seventeen thousand dollars was hearsay?

A. No, I have seen, I had seen some of his vouchers and signed

them. I won't say I had signed all. I think I signed a draft for five thousand or two thousand signed by me on the Globe National Bank for payments. I was familiar that Mr. Van Dyke had received seventeen thousand dollars, and with that interest in mind I spoke to Mr. Van Dyke about the return of the money.

Q. But you did not know on what agreement or arrangement he had received that money?

A. Why it was due and repayable at that time, but you say it was hearsay from Mr. Hoveland?

A. I am not saying it was. You testified a moment ago you knew nothing about the contract entered into between this defendant and Mr. Hoveland in January, 1909?

249 A. Absolutely nothing.

Q. And you knew nothing about that contract at the time this money was paid?

A. Absolutely nothing about the terms of it.

Q. Then you do not know of your own knowledge that this money represented by these vouchers—this seventeen thousand dollars was due and repayable to the company, do you?

A. Yes, from the vouchers stated.

Q. From the vouchers?

A. Yes.

Q. But there may have been something else other than in this case that renders that money not payable at this time that you know nothing about?

A. That I know nothing about?

Q. As you have never been instructed by any officers you say of the Cordova Copper Company to tell Mr. Van Dyke that you applied any of this five thousand dollars on the eastern accounts?

A. I think I answered that.

Q. You said no?

A. If that is the way it stands——

Q. You still say no?

A. I will stand by my previous statement.

Q. And that this application was voluntary on your part?

250 A. As Manager of the company.

Q. Now after you had made this statement to Mr. Van Dyke — the manner in which that money had been applied, did you have any further conversations with him or had your relations become estranged by that time?

A. I have had several conversations with Mr. Van Dyke since.

Q. And you say now in any of these conversations he never protested to you against the application of that money on the eastern accounts?

A. To the best of my recollection the man never protested to me.

Q. That is the best of your recollection?

A. Yes, sir, I have to rely on my recollection.

Q. Is your recollection on this subject as clear as to the time you had these conversations a week, or two weeks, or a month, or four months, or six months before this money was paid?

A. I presume about the same.

Q. As a matter of fact you don't remember whether Mr. Van Dyke did or did not protest to you as to the application of that money?

A. Yes, I do. He never protested to me about the application of the eastern money. I say my best recollection is he never protested to me about the application of the eastern money which I sent to Duluth.

251 Q. Yes, that is the best of your recollection, but you cannot swear positively?

A. Only on my recollection. I have made the statement——

Q. I ask you to state now positively did or did not Mr. Van Dyke, after you had rendered a statement of the application of the payment of five thousand, object and protest to you as to the manner of the application of that money? Did he or did he not? Yes or no?

A. To the best of my recollection he did not.

Q. Yes or no?

A. I cannot apply anything else.

Q. Best of your recollection?

A. Yes, sir, he did not.

Q. Your recollection is not clear?

A. I think it is.

Q. It is just as clear you say as your recollection of the date of the conversation you had with Mr. Van Dyke as to the payment of this five thousand dollars; that this money was paid, but no more clear?

A. I will say that.

Q. And your recollection on that point is so clear you cannot tell whether it occurred a day or six months before?

A. That is true.

Q. Now meanwhile you received this five thousand dol-
252 lars?

A. The money was paid our office. I say I received it through my accountant or clerk. The money was paid our office like any other money might be paid our office. I was cognizant of it and I wrote a letter to Mr. Hoveland stating that the money had been paid. There is a copy of the letter here that the money had been paid, and I think I sent him a draft. I think that is the way it stood when he saw the agreement of Van Dyke and saw the money so paid should be applied——

Q. That is on March 19th?

A. March 11th. Money was paid in our office and sent to Duluth to be applied on his accounts.

Q. Said to Mr. Hoveland your agreement with Van Dyke was to apply the money as stated?

A. Yes, sir.

Q. You made that statement to your chief, Mr. Hoveland, in face of the fact that Mr. Van Dyke had repeatedly objected to the payment of these accounts, did you?

A. That was my——

Q. Did you?

A. Yes, my letter says it. I am willing to stand on the letter.

Q. Well then what you said to Mr. Hoveland in that letter as to the agreement with this defendant was not true?

253 A. I wrote him and told him that was my understanding when I got the money—this five thousand dollars, I would apply the five thousand dollars on those charges. My letter is very detailed, and at the time I wrote it I was familiar with negotiations; and, as I said before, Mr. Van Dyke had objected. I am not trying to get around that.

Q. In his objection he claimed, did he not, your company was bound to a contract with him to pay these accounts?

A. He had no contract with the company.

Q. Didn't you say a moment ago you did not know anything about a contract between Mr. Hoveland and this defendant? In January, 1909?

A. I say so now.

Q. You mean you did know a contract was signed?

A. I don't know what I mean.

Q. You recognize such a thing as a verbal or oral contract, don't you?

A. Yes, I do recognize a verbal or oral contract.

Q. Now Mr. Van Dyke told you the contract had not been signed?

A. I don't remember.

Q. Didn't you say a moment ago he told you the contract had not been signed?

A. No, our conversation—Mr. Van Dyke discussed this

254 so many times——

Q. That the contract entered into between Van Dyke and Hoveland in Duluth?

A. No contract had been signed. I will put it that way.

Q. What contract did you have in mind when you said "the contract"?

A. I will retract that if I said "the contract." I said no contract had been signed. That was my understanding with Van Dyke.

Q. You retract "the" if it had a bearing?

A. No, sir, not if it had a bearing, simply if it affects my statement to make it clear.

Q. You mean if the word "the" makes your statement definite you want it there. Is that it?

A. No, sir, I just want to convey to the jury that my understanding with Mr. Van Dyke was that there was no contract signed.

Q. Now as a matter of fact, at the time you demanded this five thousand dollars from Mr. Van Dyke you needed that money here to pay western accounts, did you not?

A. The company was short of money. I sent that money to the eastern office, Mr. Jacobs.

Q. That is not the question. Didn't you hear the question?

A. Yes, sir.

255 Q. At the time you demanded this money from Mr. Van Dyke you told him that the company was short of money, that they needed money here on these western accounts?

A. I might have told him that. I would not deny it.

Q. That was true, was it?

A. I believe it was.

Q. Now, as a matter of fact, wasn't all of that five thousand dollars used and expended by you here in payment of the western accounts?

A. No, sir, I sent that five thousand to Duluth.

Q. The whole five?

A. Yes, sir, I sent a draft for it.

Q. It was your business as manager here for this corporation to pay these accounts here, wasn't it?

A. Yes, sir, there is a bookkeeping feature of this. Our Secretary in the east has trial balances and other statements exactly the same as our books in the western country. Those accounts are open accounts on his books the same as on ours. We always make it a practice to in an account of that kind send the money to the eastern office to the secretary there. It is kept in the eastern office, then by bookkeeping arrangements credit is given the western office.

Q. Who made the payment of the western accounts here?

256 A. That was made through the eastern office. Just a transfer of bookkeeping.

Q. Who handled the actual money in making the payment of these western accounts, Mr. McCarthy?

A. The actual money is handled in the east and credited in the west. We do not handle the money to make the payments. Just a transfer to the western accounts.

Q. Who paid for the labor performed out here on this Cordova, Mr. McCarthy?

A. We paid for the labor out here through our western office. The secretary taking the five thousand sent east and crediting those accounts, and later in the transfer of bookkeeping our accounts were closed up.

Q. How long after you received this five thousand before you sent it east?

A. I think it was the same day. I have a letter here if I may refer to that.

Q. Never mind your letter. You think the same day?

A. Yes, sir.

Q. In what form did you receive that payment? Draft, check or voucher?

A. I could not tell you that.

Q. Did you cash it?

A. I could not tell you that.

Q. Did you send the same voucher received on to the eastern office?

A. My letter says draft. I am not sure how the transfer was made. The money was sent in the form of collateral in a

257 draft.

Q. Then as a matter of fact you yourself did not use any of this money to pay these western accounts?

A. That five thousand dollars?

Q. Yes?
A. No, bought a draft for five thousand dollars.
Q. Then you sent this money right back to the eastern office?
A. Yes, sir.
Q. And the eastern office made the application of the payment, didn't they?
A. Yes, sir.
Q. Then you did not make this application?
A. It was made later through the eastern office and the account was wiped out.
Q. Who sent this communication to Mr. Van Dyke; that is plaintiff's exhibit U? Was that sent from Globe office?
A. It was sent from my office here.
Q. Did you send that as manager?
A. Yes, sir, I did.
Q. Then did you make this account by yourself?
A. Yes, sir, the application contains this exhibit U. You mean the listing of the accounts?
Q. Yes?
A. Yes, sir, we did in our office.
258 Q. Who is "we"? You and your bookkeeper?
A. Our bookkeeper gave me those figures.
Q. You have never received any instructions from the eastern office as to the application of these payments?
A. I think I said that. I will stand on the record I made before.
Q. That this emanated from you?
A. That it emanated from our office.
Q. Without any instructions from the company?
A. Yes.

Plaintiff rests.

Mr. JACOBS: I desire to make a motion, may it please the court.
The COURT: Very well.
Mr. JACOBS: I suppose the jury should be excluded under the circumstances.
Jury admonished and excused from the court room with instructions to remain within calling distance.
259 Mr. JACOBS: We move at this time, if it please, the court, for a non-suit of the plaintiff in this action upon the ground that it has failed to establish its cause of action set forth in the complaint, and motion is made upon this theory: (Continues).
Colloquy between court and counsel.
The COURT: Let the records show that the motion was denied.
The COURT: Proceed, Mr. Jacobs.

Mr. CLEVE W. VAN DYKE, called as a witness in his own behalf, having been previously sworn, testified as follows:

Direct examination.

By Mr. JACOBS:

Question. Now, Mr. Van Dyke, you know Hoval A. Smith?
Answer. Yes, sir.
Question. He was an officer of this com- was he not?
Answer. Yes, sir.
Question. The Cordova Copper Company?
Answer. Yes, sir.
Question. Vice-president I believe, wasn't he?
Answer. Yes, sir.
Question. Vice-president of the Cordova Copper Company?
Answer. Yes, sir.
Question. And was such at all times since it has been organized until it finally closed?
Answer. Yes, sir.
260 Question. He has always been the vice-president?
Answer. Yes, sir.
Question. Do you recall having had a conversation with the vice-president of the Cordova Copper Company before he became such, in reference to the mineral rights of the property described in your amended answer in this complaint?
Answer. Yes, sir.
Question. Where did that occur?
Answer. Occurred in Bakerville, Arizona, that is near Bisbee, in his Arizona office.
Question. Who introduced the subject of these mineral rights in that conversation?

Counsel for plaintiff objects to the question upon the ground that anything pertaining to the substance of the conversation is hearsay.
Colloquy between counsel.
Question read.
Question withdrawn.

Question. What offer, if any, did Hoval A. Smith at that time make to you in reference to the mineral rights to the land described in the defendant's amended answer?

Mr. NAVE: I object to it as hearsay and certainly immaterial in this case. Any offer made by Mr. Smith or by any other person which was not consummated in this contract is not relevant to the issue in this case.
Objection sustained.

Question. I will ask another question: In this conversation
261 that you had with Mr. Smith, what, if anything, was said by Mr. Smith on behalf of Mr. Hoveland or the proposed Cordova Copper Company, leading up to the contract made between you and Mr. Hoveland in Duluth in January, 1909?

Mr. NAVE: I object to that question first, upon the ground that it is hearsay, and second, because it embraces an element of agency on behalf of Mr. Hoveland, while no such agency exists, and third, it is immaterial what transpired between Mr. Van Dyke and a third person when the contract was made only between him and Mr. Hoveland.

Colloquy.

Mr. JACOBS: I allege it will be rebuttal to testimony given by Mr. Fairchild yesterday afternoon.

Mr. NAVE: Will you show that when Mr. Hoval A. Smith made this statement that Mr. Hoveland was present?

Mr. JACOBS: No.

Mr. NAVE: I renew my offer I made yesterday: If that letter can go in I don't care what he puts in with respect to Mr. Hoval A. Smith in this case.

Further colloquy.

The COURT: I will rule on it at 1:30, we will now take recess until that time.

Jury admonished and recess taken until 1:30 P. M.

After Recess.

Roll call of jury. All present.

Mr. JACOBS: I believe your honor was about to rule upon testimony.

The COURT: Mr. Reporter will you read the question and the objection thereto.

Question read.

Objection sustained. The court remarking: "The court thinks you have the right to an answer from this witness
262 as to his side of the conversation at that time, going to that extent that being in the nature of a conversation in which it was an admission against the interest on the part of the defendant, he can give his side of that particular conversation. That is another conversation. So far as the other conversation with Mr. Smith I look upon that as being in the nature of hearsay evidence and therefore it will be excluded."

Question. Now what did you tell Mr. Smith? What did you say to Mr. Smith in that conversation?

The COURT: Only when Mr. Fairchild was present.

Mr. JACOBS: I understood your honor to say he could testify to what he said to Mr. Smith at this conversation?

The COURT: No.

Mr. JACOBS: Well, now to get the record clear—not that I desire to violate the ruling of your honor—I wish to ask another question:

Question. At this conversation with Mr. Smith, to which your attention has been directed in previous questions recently propounded to you, what, if anything, did you tell Mr. Smith in refer-

ence to the mineral rights in the land described in the defendant's amended answer in this suit?

Mr. NAVE: I object to that question, first, upon the ground that it is immaterial what he said and, second, it is a selfserving declaration.

Objection sustained.

Counsel for defendant excepting.

263 Question. Mr. Van Dyke did you ever receive any notice from the Cordova Copper Company through any of its officers as to the application of the payment of the five thousand dollars testified to by Mr. McCarthy?

Answer. Yes, sir.

Question. From whom did you receive that notification?

Answer. David Fairchild, treasurer.

Question. Mr. Fairchild?

Answer. Yes, sir.

Question. The gentleman who testified yesterday?

Answer. Yes, sir. I believe the application was signed by David Fairchild, or Harvey Smith acting for him.

Question. David Fairchild was treasurer of the plaintiff corporation at that time?

Answer. Yes, sir.

Question. And Harvey P. Smith was its secretary?

Answer. Yes, sir.

Question. Have you that notification?

Answer. Yes, sir.

Question. Will you produce it?

Answer. Yes, sir. (Witness produces the notification as requested and hands it to Mr. Jacobs).

Mr. JACOBS: We offer the notification in evidence.

Mr. NAVE: No objection.

The COURT: Let it be received and marked Defendant's Exhibit L-12.

264 Exhibit L-12 read to the jury by Mr. Jacobs.

Question. You heard the testimony of Mr. McCarthy?

Answer. Yes, sir.

Question. You heard his testimony in which he stated that he told you how he intended to apply these payments?

Answer. Yes, sir.

Question. This Exhibit L-12—What did you say it was, Judge?

The COURT: L-12.

Question. About how many conversations did you have with Mr. McCarthy in reference to the payment of this five thousand dollars mentioned by him?

Answer. Mr. McCarthy saw me several times in reference to money. He wanted money.

Question. What did he say to you?

Answer. He said they were very much in need of money and he

would like to have me advance some money to him, and I protested constantly every time that I advanced any money to them about having it—I made protests to the company and made certain objections and that these were not fair accounts. He said I don't know about them that is the western end, the mining end. He said this contract you made was with Mr. Hoveland in Duluth, you pay me this money on account and any difference you can adjust between you and Mr. Hoveland; and that was the understanding in which I advanced him all the money advanced to him.

Question. Pay me this money on account?

265 Answer. Yes, sir.

Question. Did he say on account of what?

Answer. Well, he said it was on general account as I understood it.

Question. General account?

Answer. Yes, sir, because when I paid them this last money I did not owe them a cent. They all agreed to that. This money was on general account. They needed the money. I will show you in one of the letters on file there where I told them——

Mr. NAVE: Wait a minute Mr. Van Dyke. I think I will have to have Mr. Van Dyke stay to the statement.

Question. Was anything said to you by Mr. McCarthy about applying any portion of this five thousand dollars on the repayment of the seventeen thousand dollars advanced to you by the company?

Answer. No, sir.

Question. At any time in conversation?

Answer. No, sir, never discussed that phase of it with him.

Question. Did you ever at any time authorize Mr. McCarthy to apply any portion of that five thousand dollar payment or any other money on the repayment of the Cordova Copper Company of the seventeen thousand dollars?

Answer. No, sir, I can explain how that came up if you wish.

Question. If Judge Nave doesn't object we will be pleased to listen to it?

The COURT: Proceed.

266 Answer. When Mr. McCarthy came to me for money; at that time I didn't have any and I told him about a payment that I would have coming due and which amounted to five thousand dollars. I had business away from here at the time and he said he needed the money very much indeed and he wished I would arrange so he could get it, and I left an arrangement with Alderman & Elliott, who represented the Miami Copper Company, to have the money advanced to Mr. McCarthy and this was advanced to him in my absence.

Question. At his request on account of being very much in need of money?

Answer. Yes, sir.

Question. Now you say that when this money was paid you were away and that you authorized Alderman & Elliott to transfer this

money to Mr. McCarthy upon receipt from the Miami Copper Company?

Answer. Yes, sir.

Question. I direct your attention to Plaintiff's Exhibit U, being a letter from that company—The Cordova Copper Company—dated April 21st, 1910. Where were you when that letter was mailed to you if mailed about the date indicated in the letter, if you recall it? Were you in Globe?

Answer. As I remember it was in Washington, D. C.

Question. Washington City?

Answer. Yes, sir.

Question. When was that letter first called to your attention?

267 Answer. Here.

Question. To note the contents of it?

Answer. When I was sued by the Cordova Copper Company for various matters I gathered the various papers together in the case and I found this in my correspondence.

Question. That is when you were sued in this case?

Answer. Yes, sir.

Question. Do you recollect ever having read the contents of that letter before you were sued in this case?

Answer. No, I don't recollect ever having read it until this case came up.

Question. At the time you organized the Cordova Townsite Company did you cause, or the company cause, to be prepared stock certificates?

Answer. Yes, sir.

Question. Can you produce one of these stock certificates or one of each kind of stock?

Answer. Yes, sir, we have both preferred and common in accordance with our contract with the Cordova Copper Company. That is the preferred and this is the common. (Hands certificates to Mr. Jacobs).

Question. I call your attention to certificate Number 107, indorsed "preferred stock." Is that one of the certificates prepared for issuance by the Cordova Townsite Company at that time?

Answer. Yes, sir.

Mr. JACOBS: We offer it in evidence.

268 Mr. NAVE: We object upon the ground that it is not material evidence in this case.

Mr. JACOBS: We will follow it up.

The COURT: He alleges in his defense that this will be part of the evidence.

Mr. JACOBS: We will cover the phase of the case that the judge objects to that we did not issue as fast as the money was paid.

The COURT: The objection will be overruled. Let it be received and marked Defendant's Exhibit M-13.

Question. I call your attention to blank certificate of the Cordova Townsite Company No. 100, indorsed for one hundred shares of the

capital stock of the Cordova Townsite Company. Is that one of the certificates prepared for issuance by the Cordova Townsite Company?

Answer. Yes, sir.

Question. Does it represent preferred or common stock?

Answer. That represents common stock.

Mr. JACOBS: We offer it in evidence.

Mr. NAVE: Same objection.

The COURT: Same ruling. Let it be received and marked Defendant's Exhibit N-14 in evidence.

Exhibits M-13 and N-14 read to the jury by Mr. Jacobs.

Question. Now I direct your attention, Mr. Van Dyke to the shares of preferred stock of the Cordova Townsite Company and ask you why this stock was not issued to the plaintiff herein
269 at the time of the payment of this seventeen thousand dollars at different times?

Question objected to by counsel for plaintiff upon the ground that it is immaterial.

Colloquy between counsel and court.

Question read.

The COURT: Your theory is it will become important under counter-claim?

Mr. NAVE: Yes, sir.

The COURT: The objection will be overruled.

Question. Now Mr. Van Dyke explain to the jury why this preferred stock was not issued to the plaintiff?

Answer. When the two thousand dollars and the five thousand dollars was paid neither the Cordova Copper Company nor the Cordova Townsite Company had been organized, and it took sometime to organize these companies; and during the summer sometime, I forget the exact date, the Townsite Company was organized and the two kinds of stocks were prepared in accordance with my contract, and when I had them printed I took copies of both kinds of stock down to the vice-president of the company and told him I was prepared to issue the stock. He said he was about to go to Duluth and would take the matter up with Mr. Hoveland, and that on his return he would let me know what the situation would be like. The reply that I got to that situation was——

Mr. NAVE: I object to that as hearsay.

Objection sustained.

Question. Reply from whom?

270 Answer. From Mr. Hoveland.

Mr. NAVE:

Question. Direct reply from Mr. Hoveland to you?

Answer. In this letter. The letter is on file.

Mr. NAVE: I object upon the ground that the letter is the best evidence.

Mr. JACOBS:

Question. Which letter? Do you recollect?
Answer. I don't recollect the exact letter. Either a letter or a gram. He said——

Mr. NAVE: I object upon the ground that the paper is the best dence.

Question. Did you ever receive any reply to your proposition?
Answer. Just as I have stated.
Question. Wait a minute. Did you ever receive a direct reply to proposition for the issuance of the stock?
Answer. No, sir, not a direct reply.
Question. But you did inform the vice-president you were pre-ed to issue the stock?
Answer. Yes, sir.
Question. And it was at his suggestion you did not issue it?
Answer. He handled it in the way I said. He said he would the matter up with the president of the company.
Question. And your action was deferred by reason of that?
Answer. Yes, sir.

Mr. NAVE: When you said vice-president I thought you were talking about the vice-president of your own company?
Answer. No, sir, vice-president of the copper company.

(Mr. Van Dyke's statement to the jury as to why this preferred k was not issued to the plaintiff was read by request.)

Mr. NAVE: Then I withdraw my objections to that line of ques-ns.

Mr. JACOBS: Does counsel admit his objection was wrong.
Mr. NAVE: I not only admit it was wrong, but call attention to it.
Answer. There is a correction I wish to make in that statement. ce reflecting I don't remember whether I took the printed form, I had these forms gotten up first.
Question. Rough draft?
Answer. Rough draft, and took them to him first. Those were and later on I took some printed forms to him.
Question. You took them to him for his approval?
Answer. Yes, sir.
Question. And submitted the form for approval?
Answer. Yes, sir.
Question. And then he told you he was going to Duluth and uld take the matter up with Mr. Hoveland?
Answer. Yes, sir.
Question. Now did he ever inform you he had taken the matter up with Mr. Hoveland?
Answer. I don't think he ever did, I don't recollect it. All I got was a letter from Mr. Hoveland.
Question. Did you ever receive any communication from the vice-sident of the Cordova Copper Company or any other officer of Cordova approving the form of stock certificate you had pre-ed and submitted to them for their approval?

Answer. No, I never did.
Question. Never have?
Answer. No, sir.
Question. Has the Miami Townsite Company ever been demanded to issue to them this stock provided for in the contract set up in your answer?
Answer. No, sir, they never demanded it. I can tell you where I got the certificate if you want me to.
Question. All right let us have it.

Mr. NAVE: What is the materiality?
Mr. JACOBS: Never mind let it go.

Question. You have been president of the Miami Townsite Co., formerly known as the Cordova Townsite Company, since the organization?
Answer. Yes, sir.
Question. Do you know whether or not—Do you know the financial condition of the Miami Townsite Company and the Cordova Townsite Company?
Answer. In a general way, yes.
273 Question. Do you know whether or not there have been any net proce-ds in the treasury of that company?
Answer. There has not.

Mr. NAVE: I ask that the answer be stricken until I can make my objection.
The Co[illegible]r: It may be.
Mr. NAVE: I object to the question as immaterial by reason of the fact that no preferred stock certificates have been issued to us in this case.
The COURT: That is in line. The objection is overruled.

Question read.
Answer. There has not.
Question. This Miami Townsite Company's property; that is, the land described in your amended answer here: The surface and down to a depth of forty feet below the surface; I call your attention to that land, that portion of it now owned by the Miami Townsite Company, and ask you if you can approximate its value?

Question objected to by counsel for plaintiff upon the ground that it is immaterial.
Objection sustained.
Exception reserved by defendant.

Question. Now I want to take you up to Duluth, and call your attention to that conversation with Henry B. Hoveland in the month of January, 1909. You have heard the testimony of Mr. Hoveland in this case in reference to his alleged contract with you in which he claims this agreement with you was that he advance
274 sufficient money to pay off your option on the property described in the amended answer; that you should deed to them the mineral rights and thereafter pay back the money

advanced to you leaving them the mineral rights without any other consideration?

Answer. He is wrong about that.

Question. You heard his testimony?

Answer. Yes, that is wrong.

Question. Did you ever have such an agreement with Mr. Hoveland?

Answer. No, sir.

Question. Did you ever have any other agreement with Mr. Hoveland than the one set forth in your amended answer?

Answer. No, sir, he has forgotten. He makes a great many contracts and——

Mr. NAVE: Leave the speeches out Mr. Van Dyke.

Answer. He has got his contract mixed.

Cross-examination.

By Mr. NAVE:

Question. This receipt signed by Mr. Fairchild for $25,515.66, Exhibit L-12, has been in your possession ever since you received it until produced here this morning has it?

Answer. I don't know about that, I don't see the papers all the time, but it has been in my possession because I found it in my records.

Question. How did that "Received May 27th, 1912, Mike McCarthy" get on it?

Answer. I think it was received through Mr. McCarthy's office and sent to mine.

Question. Came through Mr. McCarthy?

Answer. Yes, sir.

275 Question. As a matter of fact it was enclosed to you with this letter from Mr. McCarthy marked Plaintiff's Exhibit U?

Answer. I don't know, I could not say.

Question. As a matter of fact you did receive and receipt not merely this receipt, but a receipt for the Live Oak Development Company account for $200.00?

Answer. I told you I found this in my files.

Question. You found another receipt there too?

Answer. Yes, sir.

Question. Then you did not mean to say that was the only receipt received covering this transaction? You have got a receipt covering each item in this letter from Mr. McCarthy?

Answer. Not from Mr. McCarthy; that is the only one I found.

Question. But receipts signed by Mr. Fairchild?

Answer. Those items by Fairchild and from here on, as I remember it, by Mr. Witt.

Question. That were enclosed and came with this letter from Mr. McCarthy?

Answer. I don't know about that.

Question. These did?

Answer. I don't know about that.

Question. That is his name?

Answer. All I can say——

Question. In spite of the fact that is stamped "Received by McCarthy" you do not know whether it came from Mr. McCarthy?

276 Answer. I surmise it did. I do not know. I want to say I don't open the mail at our office and I don't know really when that came in.

Question. Do you know which of the two gentlemen, Messrs. Alderman and Elliott paid that five thousand you referred to?

Answer. No, I was not present at the time here.

Question. Suppose you accepted that agreement, Mr. Van Dyke, but when you left you found out your mistake and came back to correct it, and you handed that check to Mr. Witt in Mr. McCarthy's presence in the office?

Answer. If you will let me I will be glad to tell you——

Question. Didn't you do that?

Answer. As I remember I was going to be gone from here and I wrote a personal check as I remember against the First National Bank where I had no funds and turned this over to the Cordova Copper Company with the instructions to Alderman and Elliott that when this money should come due that they cover that and with instructions to the Cordova Copper Company that they would not cash it until such time as this money was placed in the First National Bank.

Question. Then you——?

Answer. That is the way I remember it. Of course, I never thought of it since.

Question. Why, then, have you been constantly interested that you are not the person who turned that five thousand dollar check in?

Answer. —.

277 Question. When was the Cordova Townsite Company organized?

Answer. In the summer of 1909. The articles of incorporation are on file.

Question. It was sometime after the ten thousand dollar payment made by the Cordova Copper Company?

Answer. I don't recollect that, because immediately upon my return to Globe——

Question. Never mind, they are on file?

Answer. It seems to me they were not filed until the last of April sometime.

Redirect examination.

By Mr. JACOBS:

Question. They were recorded the fifteenth day of July, 1909, at fifteen minutes after three. You say there has never been any net proceeds in the treasury of your company?

Answer. There have been extensive gross receipts from the sale of lots; that is money taken in.

Question. That was in excess of twenty or thirty thousand dollars, wasn't it?

Answer. Yes, sir.

Question. From the sale of real estate?

Answer. Yes, sir.

Mr. NAVE: Now as I understand it we are going upon the cross-complaint.

Mr. JACOBS: Yes.

The COURT: That figures all the evidence in the main case?

Mr. JACOBS: I think so, unless I have overlooked something.

278 Mr. NAVE: I should perhaps close up one other matter before turning Mr. Van Dyke over to the cross-complaint.

Recross-examination.

By Mr. NAVE:

Question. At the time you say you had that conversation with Mr. Smith with respect to the issuance of preferred stock Mr. Smith himself told you that your agreement was that you were to pay back the money and give the mineral rights under your townsite company instead of giving preferred stock, did he not?

Answer. No, sir, Mr. Smith never had the opportunity of misunderstanding my position, nor Mr. McCarthy.

Question. Let me call your attention to a sentence here——

Mr. JACOBS: Is that the letter you are trying to get in evidence?

Mr. NAVE: I haven't tried to get it in the case.

Mr. JACOBS: I object upon the ground that what is contained in that letter is hearsay and not binding upon this defendant.

Mr. NAVE: Let me ask a question, your honor.

The COURT: All right.

Mr. NAVE: I just suggest you read that and four or five lines on the next page.

Mr. JACOBS: I would like to ask if that is letter addressed by Mr. Smith to Mr. Hoveland, for information?

Mr. NAVE: It is, yes, sir.

279 Question. Do you still wish to say Mr. Van Dyke that Mr. Smith did not have some understanding of that contract Mr. Hoveland had——?

Counsel for defendant objects to the question upon the ground that it is not proper cross-examination.

Objection sustained.

Answer. That occurred several months before this letter was written.

Question. How many months?

Answer. This wasn't written until late in the fall.

Question. After you got up your certificate?

Answer. I said I showed him a rough draft. That was several months after that happened.

Question. Well, in any event, that proposal of yours was turned down?

Answer. No, sir.

Question. With respect to the stock certificates?

Answer. No, sir, he was about to go to Duluth to see Mr. Hoveland and he said he would take the matter up—this was the matter between Mr. Hoveland and myself—he would take the matter up with Mr. Hoveland in Duluth.

Question. Mr. Hoveland turned it down?

Answer. No, he did not refer to it directly at all, presented another proposition.

Redirect examination.

By Mr. JACOBS:

280 Question. Now, Mr. Van Dyke, have you those vouchers?

Answer. (The vouchers are produced by the witness as requested).

Mr. NAVE: For the purpose of making the record clear I ask that it now show that both parties rest on the main complaint and answer. Of course, if Mr. Jacobs wants to reopen I shall not object. But I would like for the present to have it show that both parties have rested on the complaint and answer and that we are now proceeding upon the cross-complaint and answer thereto.

The COURT: Let the records so show Mr. Reporter.

Question. Now Mr. Van Dyke you have testified—I withdraw that. In plaintiff's exhibit D I wish to call your attention to this provision on page three:—

Mr. NAVE: In order to keep the record straight, before you make any use of that, that paper should be in evidence in this cross-complaint. It does not need to be remarked, but I want the record straight.

Question. You are acquainted with Henry B. Hoveland?

Answer. Yes, sir.

Question. Did you meet him in Duluth in January, 1909?

Answer. Yes, sir.

Question. And on that occasion did you enter into any con-

281 tract with him in reference to the mineral rights described in this amended answer?

Answer. Yes, sir.

Question. I call your attention to an exhibit—I won't use that now—marked plaintiff's exhibit A, and ask you what contract that is?

Answer. This is the contract. That is a copy of it.

Question. That you entered into with Mr. Hoveland at that time?

Answer. Yes, sir.

Mr. JACOBS: We offer it as defendant's exhibit on the counterclaim and cross-complaint.

Mr. NAVE: We object to it being received in evidence upon the

ground that it is not relevant to any issues presented by the counter-claim.

Mr. JACOBS: I will withdraw the offer.

Mr. NAVE: May we understand then that the defense will proceed upon the theory that all of the evidence as now in the record is to be considered as evidence under the issues presented by the cross-complaint and the answer thereto?

Mr. JACOBS: Any portion that applies to this is bound to be considered by the jury and by the court.

Mr. NAVE: And we will try the case on that theory?

Mr. JACOBS: I don't know whether that is your theory or not, it is my theory.

Mr. JACOBS: All ready?

Mr. NAVE: Yes, sir.

282 Question. I direct your attention, Mr. Van Dyke, back to October 15th, 1909—Pardon me just a minute. I can save time by having the gentleman indicate here something—to January 3rd, 1909, to an expense for discovery work on mining claims. Have you a document there showing what that expense represents? Exhibit B, number seven, I believe, of your files? This document you have has a statement on the head: Miami Townsite Company, Cleve W. Van Dyke, Miami Townsite Company, Cordova Copper Company, Globe Consolidated. When did you get that statement?

Answer. It was sent me by the Cordova Copper Company.

Question. Consisting of two sheets?

Answer. Three sheets.

Question. Or two sheets and a half—three sheets?

Answer. Yes, sir.

Mr. JACOBS: We will offer that in evidence.

Mr. NAVE: I object, if the court please, on the ground that on its face it is not relevant to any issue presented in this case.

Mr. JACOBS: We will follow it up and explain that, your honor, and make it relevant and material.

Mr. NAVE: We can save time if Mr. Jacobs will make an avowal what he proposes to prove under this cross-complaint.

Mr. JACOBS: Let us put this in evidence and he can examine him.

283 Mr. NAVE: Suppose you make an avowal then with respect to the matter you are now proceeding to prove.

Mr. JACOBS: The counsel here can not force me to make an avowal.

Mr. NAVE: I suggest your honor request an avowal with respect to that.

Mr. JACOBS: I want to prove the items of this account were paid by Mr. Van Dyke, and then I will follow it up and show that this is a portion of that five thousand dollars, or money that was advanced by Mr. Van Dyke to this Cordova Copper Company which was to be adjusted, as Mr. McCarthy says, later between this defendant and Mr. Hoveland.

Mr. NAVE: He has made the avowal and your honor can see it is

utterly immaterial. He has paid that account to us and it is a settled account.

Mr. JACOBS: I will withdraw that and go at this in another way. Just check up that and we will get at this in another way.

Question. This second item there?

Answer. Those are all part of the same account.

Question. On January third. Does that include watchman's account?

Answer. No, sir, that is different.

Question. Now we will take January 3rd, watchman's, portion of watchman's account is included in that statement, that is not a receipt merely a statement showing some money paid and some not paid?

284 Answer. I have got receipts from this company.

Question. What agreement did you have with the Cordova Copper Company with reference to the payment of the watchman's account?

Answer. We had one watchman who cared for our common ground, and they were to pay two thirds of his salary and I was to pay one third.

Question. Who did you make that agreement with?

Answer. Vice-president of the company, Mr. Smith.

Question. They were to pay two thirds and you were to pay one third?

Answer. Yes, sir, during the months of July, August and September they paid all of it and during the months of November, December and a portion of January I paid all of it, and they charged me $128.00 on their account for July, August and September, they paid $383.90 and charged me $128.00 and I paid a total for the time that he worked—balance of the time he worked—$566 and deducted the $128 that I owed them on that account and left a balance due me of $252 which I charged on this account.

Question. Now you had advanced on this watchman's account two hundred and how much?

Answer. $250 after deducting what I owed them—$128 and that amount of $250 was due me.

Question. Two hundred and fifty dollars due you?

285 Answer. Yes, sir; that is, after I paid the one hundred and twenty-eight dollars.

Question. You advanced that for the use and benefit by and under your agreement with the vice-president?

Answer. Yes, sir, with Mr. Smith.

Question. Has that money been repaid you?

Answer. No, sir, it never has. I have the checks and vouchers and everything showing that this has been paid.

Question. Have you the checks?

Answer. Yes, sir, you will notice right after these items, exhibit D, etc., that it shows which envelope this is. There are the vouchers.

Question. Three?

Answer. All of those.

Question. Now I call your attention to a voucher of date of February 5th, for $125. Do you recognize that?
Answer. Yes, sir.
Question. That is for the payment of what?
Answer. For the payment of watchman's services, Mr. Stevens.

Mr. JACOBS: I offer that in evidence.
Mr. NAVE: I object upon the ground that that is a matter of the Miami Townsite Company and not in this case.
Mr. JACOBS: I will withdraw the offer.

Question. This money represented by this voucher was paid by the Miami Townsite Company for you?
286 Answer. Yes, sir.
Question. And charged against you on the accounts?
Answer. Yes, sir.
Question. On money they owed you at that time?
Answer. Yes, sir, you will find on each one of these vouchers the place where this is entered in the ledger against my personal account.

Mr. NAVE:

Question. It is actually a personal payment by you and not by the company?
Answer. Yes, sir, paid their company.

Mr. NAVE:

Question. This is a payment you yourself made and not the company?
Answer. Yes, sir.

Mr. NAVE: Very well. No objection.
Mr. NAVE: I will not require you to put in separate items, but simply ask for an opportunity to inspect vouchers.

Question. I will ask you a general question, giving the number of each voucher, putting into the record a part of it in that way, and in your testimony to the moneys paid I want you to confine yourself to moneys paid either by you or for you or charged to your personal account by the Miami Townsite Company?
Answer. Yes, sir, that is what I will do. Now if Mr. McCarthy wants to understand that I will have to explain to him (witness explains check to Mr. McCarthy).
287 Question. Now Mr. Van Dyke take these vouchers one by one in the dates and order in which they appear and tell the court what they are, to whom they were paid and for what they were paid?
Answer. Well these are vouchers paid to Mr. William Stevens on wacthman's account; that was part of my agreement with the vice-president of this company. We had one common man who was to protect and care for our property out there, and——
Question. On February 5th, how much did you pay?
Answer. $125.

Question. On November 26th how much did you pay?
Answer. $167.

Mr. NAVE: If the court please, I object on the ground that it is not the proper way to prove the account.
The COURT: Can't you allow him to testify to the salary account and stipulate the vouchers?
Mr. NAVE: That is the way to do, but we want the vouchers for his cross-examination.

Question. Well how much did you pay on the watchman's account, sum total?

Mr. NAVE: I object unless the vouchers are marked for identification and given us for use in our cross-examination.
Mr. JACOBS: If he wants to see these vouchers I do not care to conceal anything from him, but I have the right to say to this
288 defendant "How much did you pay—the whole amount, on a certain date for a certain thing?" and I want his testimony as to those things to check up with these vouchers, and I have the right to make the record clear in that regard I think.
Colloquy between court and counsel.
The COURT: Proceed Mr. Jacobs.

Question. I was going to ask him to state the dates and amounts he made these payments and he can run through. Take these and testify to the dates and amounts and tell when you paid it and how much, and we will get through with these in a short time.
Answer. On November 9th——

The COURT: I believe you had already testified to two of them?

Answer. I can fix them up if you will let me follow the list I have there. On November 9th, we paid for services as watchman during October $124. On November 26th, we paid him one hundred and sixty-seven dollars. You will find this voucher says $175, but five dollars of that was not a legitimate charge against this contract and was subtracted from it leaving $167, consequently we put in our list $167 and charges five dollars against the Townsite Company where the charge was legitimate for some other special work on some other account—I don't recollect what account but my bookkeeper would if he were here; that accounts for the five dollar difference. On January 22nd, we paid him fifty dollars. I want to say, too, that during the time this man was our watchman he was shot,
289 and perhaps some of this money was money that cared for him while he was wounded.
Mr. JACOBS: Who shot him?

Mr. NAVE: What difference does that make?

And on February 25th, one hundred and twenty-five dollars. That is for the bank account. On November 26th, this other one hundred dollars. Now prior to that time the Cordova Copper Company had paid for July, $139, and for August, $124.02, and for September, $120. Now they paid all that, and these last sums I paid. There was a total paid out for that purpose of $949.90.

Question. Now the Townsite Company's share was $315.00?
Answer. Yes, sir, that was my share and we paid $566, but $128 was owed to the company for the time they paid so that leaves a balance due me from the company of $250 on that account. That is the way that account is worked out, and this charge was vouchered and on each voucher is shown the ledger page charged to my personal account.

Mr. NAVE: I would like the voucher marked for identification.
The COURT: Wouldn't it do to mark the envelope, as they are all in one envelope?
Mr. NAVE: Yes, simply for identification.
The COURT: Very well, let the envelope containing these five vouchers—watchman's services—be marked plaintiff's exhibit A for identification.

Question. Now the next item. I will call your attention to January 3rd, 1910?
290 Answer. Yes, sir.
Question. Account of $170.90?
Answer. Yes, sir.
Question. Can you state to the court the times and the amounts of money paid?
Answer. Well, if the judge will let me I will be glad.

The COURT: He means for the jury.

Question. What is that account?
Answer. When I was in Duluth this account was being developed after our contract was made with Mr. Hoveland.
Question. Was all that expense incurred in the handling of this property?
Answer. Discovery work and survey of the mining claims, checking it up at Mr. Hoveland's request.

Mr. NAVE: May I ask him a question on voir dire?
The COURT: You may.

Mr. NAVE:

Question. Discovery work?
Answer. I mean discovery work; assessment work and original work of building the location or claim corners; monuments.

Mr. NAVE:

Question. That is the mining claims included in the Cordova Townsite Company?
Answer. Mining claims included in the Cordova Townsite Company, incuded in this contract I was telling about.

Mr. NAVE: I object to the evidence, if the court please, for
291 two reasons. First, location work and surveying are not expenses chargeable to us even under Mr. Van Dyke's theory of this written contract he says was entered into forcing or imposing upon us only the assessment work and patent work. There is an-

other objection equally fatal to any evidence of this kind, and that is that the pleadings do not cover it, and the objection seems more fatal that if the pleadings did cover it the evidence shows he is not entitled to receive it.

Colloquy between court and counsel.

Jury admonished and recess taken for ten minutes.

After Recess.

Roll call of jury. All present.

Further colloquy between court and counsel.

The COURT: I will sustain the objection to the extent of the expenses incurred by work on the mining claims for assessment work and things of that kind.

Further colloquy.

Mr. JACOBS: May it please the court, in order to get that part of the account together that is permissible to be proven under your honor's ruling we will have to go through those books, and that will take some little time. It is now nearly five o'clock and if your honor will take recess at this time I think we can come prepared in the morning to prove it.

Jury admonished and recess taken until 9:30 A. M. May 3, 1912.

After Recess.

Roll call of jury. All present.

Mr. JACOBS: May it please the court, yesterday your honor made a ruling the effect of which was to exclude from evidence in
292 this case certain facts which constitute and make up the defendant's counter-claim and cross-complaint and I desire at this time to address the court upon that question, and if the court, of course, is satisfied that the ruling is erroneous the court would not hesitate to set aside that ruling in the interest of justice, and we ask your honor to set aside that ruling and allow us to prove the items of that account.

The COURT: I will hear you, Mr. Jacobs.

Colloquy between court and counsel.

The COURT: Certainly the court cannot see it your way if there is any injustice. He cannot see at this time any reason why the ruling should not stand.

Mr. JACOBS: I wish the records to show that this is made in the form of a motion to reconsider and set aside the former ruling.

The COURT: Very well. Mr. Reporter let the records so show, and the motion is denied.

Mr. JACOBS: We reserve an exception.

Question. Now then, Mr. Van Dyke, get busy on your accounts. Mr. Van Dyke I will ask you to state whether or not you ever had any agreement with the vice-president of the Cordova Copper Company in reference to advertising the district—Miami district—Mining District?

Answer. I had an arrangement with him concerning a publicity feature.

Question. When was that? About when?

Answer. This arrangement was entered into November 3rd, 1909.

293 Question. And state, please, the arrangement you had with him?

Answer. My arrangement was——

Question. With Mr. Smith?

Answer. That there was to be expended in a publicity way covering the whole district, three thousand six hundred and ninety-nine dollars.

Question. $3,699.00?

Answer. Yes, sir.

Question. And how were those expenses to be shared?

Answer. Well, I was to—let me see——

Mr. NAVE: I should like to ask him a question on voir dire before Mr. Van Dyke goes further into that matter.

The COURT: Very well.

Mr. NAVE:

Question. Mr. Van Dyke state in detail the arrangement in respect to that?

Answer. That is what I am trying to get at.

Mr. JACOBS:

Question. Go ahead and tell the jury all the arrangements you had with Mr. Smith with respect to the publicity feature?

Answer. The arrangement at the time was this: The district wasn't greatly known. It wasn't merely an advertising arrangement, a publicity arrangement for the entire new mining district where this proposition was located; so the idea was to arrange some scheme whereby this could be done to get the most publicity at the

294 least amount of expense. So this arrangement was entered into at his request, Mr. Smith's request to me. I took the matter up first to secure a publicity amount for that purpose, with the general arrangement I mentioned.

Mr. NAVE: As to the arrangement, never mind what we did.

Answer. In order to work out the arrangement I have got to tell this.

Mr. NAVE:

Question. The arrangement——

Mr. JACOBS: I object to Judge Nave testifying to what the arrangement was.

Mr. NAVE: I desire to examine Mr. Van Dyke on his voir dire.

The COURT: Very well.

Mr. NAVE:

Question. The arrangement was—this arrangement you were re-

ferring to, that you say existed, was that you were to take steps to give publicity to the district and share the expenses in proportion?

Answer. Yes, sir, that was it.

Question. And you were to make the best terms as to the matter of expense you could?

Answer. That is should get as much for it as we could.

Question. With respect to the amount of expense incurred?

Answer. A limit was placed there.

Question. And you were not to go over that amount—that limit placed?

Answer. They were not to be responsible for any money I
295 spent over that.

Question. And you were to keep it as low as you could?

Answer. Yes, sir.

Question. Is that correct?

Answer. I was to keep it as low as I could and not to exceed the limit placed.

Question. A limit was placed?

Answer. Yes, sir.

(The questions on this page that appear above were asked by the counsel for the plaintiff on voire dire.)

Mr. JACOBS:

Question. You say they were to share the expense. What did you mean by that?

Mr. NAVE: Now, if the court please, I object to this as not a proper subject for the counter-claim in this action. Paragraph 1364 provides, etc.

The COURT (after colloquy between court and counsel): At the present time it will be sustained temporarily.

Question. Now you incurred some expenses under this did you Mr. Van Dyke?

Answer. Yes, sir.

Mr. NAVE: I object to that as immaterial and ask that the answer be stricken.

(Counsel for defendant proceeds without waiting for a ruling on the above objection.)

Question. Did you proceed under the terms of your agreement with Mr. Smith?

Answer. Yes, sir, I did.

296 Counsel for plaintiff objects to the question upon the ground that it is immaterial. Answer given before the objection was made.

Objection sustained.

Exception by the defendant.

Question. Did you have a conversation with Mr. Smith in which you submitted to him the accounts incurred by you in this publicity proposition?

Answer. I submitted first the plan and second the contract that I made for a definite amount to him at the time I made it, and it was accepted by him.

Question. That was the contract you made for a definite amount?

Answer. Yes, sir.

Question. And Mr. Smith agreed to that?

Answer. Yes, sir.

Question. Now as I understand it after you had this arrangement with Mr. Smith you entered into a contract with somebody for the expenditure of a certain amount of money?

Answer. That is the contract.

Question. And Mr. Smith agreed for the Cordova Copper Company to bear a certain portion of the expenditure incurred by you with another party?

Answer. On this definite amount, yes, sir.

Question. And did you incur any expense under your contract? I will withdraw that. Who was the third party with whom you made this contract?

Answer. Mr. Ladd.

297 Question. Leroy Ladd?

Answer. Yes, sir.

Question. And did you incur an expense under your contract with Mr. Le Roy Ladd?

Question objected to by counsel for plaintiff upon the ground it is an unliquidated account.

Question withdrawn.

Mr. JACOBS: I offer the contract in evidence—Contract between L. A. Ladd and Cleve W. Van Dyke.

Mr. NAVE: I object upon the ground it shows upon its face it is unliquidated even between him and Ladd.

The COURT: You object on what ground?

Mr. NAVE: Upon the ground, if the court please, that this doesn't tend to establish a liquidated demand against us.

The COURT: At the present time the objection will be sustained.

Mr. JACOBS: We reserve an exception.

Mr. JACOBS: We ask that it be marked for identification and filed.

The COURT: It may be received and marked Defendant's Exhibit B for identification on counter-claim.

Mr. JACOBS: Now to make the records straight on that I want to thoroughly examine this witness on what occurred under the terms of this contract with Ladd.

Question. I ask you Mr. Van Dyke if you incurred—I ask you if you submitted this contract to Mr. Smith?

Answer. Yes, sir.

298 Mr. NAVE: I ask that the answer be stricken until I can make an objection.

The COURT: Let it be stricken.

Mr. NAVE: I object upon the ground whether it was submitted or

not and whether it was accepted or not there was no obligation had under it. It was unliquidated.

Objection sustained.

Question. Now I ask you what expense you incurred and paid under the terms of that contract with Hoval A. Smith, vice-president of the Cordova Copper Company and Le Roy A. Ladd?

Mr. NAVE: I object upon the ground it has been shown that the account has not been liquidated.

Objection sustained.

Exception reserved by counsel for defendant.

Question. Did you see Mr. Smith and have a conversation with him in reference to the money you had paid under your contract with him?

Answer. Yes, sir, I did.

Question. And stated to him did you——

Question objected to by counsel for plaintiff as leading.

Question. Did you say you stated to him——

Same objection. Counsel remarking: "You can ask him what he stated."

Mr. JACOBS: What shall I ask him, your honor?

299 The COURT: Counsel will try their own case.

Question. What if anything, did you state to Mr. Smith in reference to these accounts, if you did state anything to Mr. Smith?

Answer. I stated to him the amount I had paid on behalf of his contract.

Question. On behalf of his contract?

Answer. Then I told him I wanted my share of the money paid back to me.

Question. Then you did render a statement to him of the amount of money you had paid?

Counsel for plaintiff objects to the question upon the ground that it calls for an opinion of the witness and is leading.

Objection sustained.

Question read.

Question. At the time that you submitted this statement that you testified to to Mr. Smith, vice-president of the Cordova Copper Company, the plaintiff in this case, what, if anything, did Mr. Smith say to you?

Mr. NAVE: I object upon the ground that it involves two hypotheses not concerned by the evidence; One that he submitted a statement of the account to Mr. Smith and the other that Mr. Smith was at the time vice-president of the company.

Colloquy between court and counsel.

Answer. I can explain how that all was.

Mr. NAVE: We don't want any explanations now except in response to questions.

300 The COURT: The objection will be sustained at this time.

Question. What relation did Mr. Smith bear to the Cordova Copper Company at that time?

Mr. NAVE: I object to that upon the ground——

Question. At the time you rendered this statement referred to?

Mr. NAVE: I object to that question upon the ground that there is no evidence that any statement was rendered.

Colloquy between court and counsel.

Three last preceeding questions read.

Answer. I can explain the whole transaction if given an opportunity.

Mr. NAVE: You haven't the opportunity at my consent until asked the question by your attorney.

The COURT: He may answer the question.

Question. At the time you stated to Mr. Smith what you had expended under the terms of that contract with Le Roy A. Ladd?

Answer. Well this statement included a statement of what was expended on Le Roy A. Ladd wasn't merely a Le Roy A. Ladd account; there was another account; that is, two accounts, one with Le Roy A. Ladd and one with the Silver Belt.

Question. You had another arrangement with the Silver Belt?

Answer. This was part of the same publicity account. You see the Silver Belt published——

301 Mr. NAVE: Never mind, let Mr. Jacobs ask you some questions.

Question. At this time I withdraw that question what Mr. Smith said. State whether or not you had an arrangement with Hoval A. Smith, vice-president of the Cordova Copper Company in reference to a publicity matter through the Silver Belt?

Answer. Yes, sir, I did.

Question. Now when was that arrangement made with him?

Answer. At the same time; it was a part of the same arrangement.

Question. What was that agreement?

Question objected to by counsel for plaintiff upon the ground that it was shown on examination on his voir dire that the matter was unliquidated.

Colloquy between court and counsel.

Objection sustained.

Exception by counsel for defendant.

Question. Was that statement you made Mr. Smith verbal or in writing?

Answer. Well I made it on him on several different occasions.

Question. Written or verbal?

Answer. Sometimes they were verbal and sometimes I had lists of expenditures I had made.

Question. Those lists, were they mailed or handed to him?
Answer. No, I took them up with him in conversation and discus-ed the matter with him.
302 Question. Do you know whether or not—I withdraw that. Have you a copy of any of those statements you submitted to him?
Answer. I have a copy of the bill I paid at his suggestion.
Question. At his suggestion?
Answer. Yes, sir. (Hands papers to Mr. Jacobs.)
Question. You submitted this bill to Mr. Smith?
Answer. I don't know as I submitted that same identical bill of accounts.
Question. Showing these items?
Answer. Yes, sir, showing the items on there he was entitled to pay. I want to say these particular items I wasn't supposed to pay. I wasn't supposed to pay any of these.
Question. Smith agreed to pay all of those?
Answer. Yes, sir, all of these.
Question. That was the express agreement between you and Smith?
Answer. This was a separate portion on this publicity arrangement. They sent me a list of their stock holders——
Question. Who sent you a list of their stock holders?
Answer. Henry B. Hoveland.
Question. Henry B. Hoveland, vice-president of this corporation?
Answer. Yes, sir, here is a telegram relating to it. (Hands telegram to Mr. Jacobs.)

Mr. JACOBS: We offer this telegram in evidence.

303 Mr. NAVE: I object upon the ground it is immaterial.
The COURT: The objection will be sustained to this offer.

Answer. The idea, judge, is this, the list was taken over and set up in type and the expenditure on same——
Question. You want the list?
Answer. It cost me some $40.90; that is to get up into type certain advertising of the Miami Townsite Company.

Mr. JACOBS: I offer it in evidence now.
Mr. NAVE: I want to ask Mr. Van Dyke a question on voir dire before placing my objection.
Mr. JACOBS: I object to cross-examination on voir dire with reference to cross-examination of these accounts.
Objection overruled.
Exception by counsel for defendant.

Mr. NAVE:

Question. I understand you to say you showed this particular paper to Mr. Hoval A. Smith?
Answer. No, sir, I did not say that.
Question. You did not show that to Mr. Smith?
Answer. No, sir.

Mr. JACOBS: I object upon the ground it is not proper——

Answer. I said I showed items taken from this paper to Mr. Smith.

Objection sustained.

Mr. JACOBS:

304 Question. You presented to Mr. Smith a statement of items of expenditure you had made out at his request?

Answer. Yes, sir.

Question. Please state to the court what these different items were and the amount of each one you stated to Mr. Hoval A. Smith, vice-president of the Cordova Copper Company——

Counsel for plaintiff objects upon the ground that the portion of the paper submitted is the best evidence.

Question. Have you the writing you submitted to him?

Answer. I don't know whether I have or not. I would have to look it up. I have-'t it here, no sir.

Question. In what form was it?

Answer. Why I took up with him these different items and the amount of money I had agreed to pay to Mr. Ladd, a portion of which I had paid at that time, and presented this matter to him; then since that time we have discussed it at different times, and he simply says he is sorry because he has got to repudiate the account.

Question. Has got to repudiate it?

Answer. Yes, sir.

Question. That was later?

Answer. That was, I should say some two months later.

Question. At the time you submitted—when you submitted this account to him did he repudiate it then?

Answer. No, sir, later on.

305 Question. What accounts did you submit to him?

Answer. Submitted—You mean the first time?

Question. Yes?

Answer. I submitted to him this contract where he was bound to, as I remember it, to pay, three thousand dollars, and I submitted to him——

Question. At the time you submitted to him this contract, this Defendant's Exhibit Two for identification, Exhibit B for identification, had any expense been incurred under that?

Answer. Yes, sir.

Question. And what, if anything, did you tell him about that expense that had already been incurred?

Answer. Why I told him it was a pretty late day to come up and repudiate a deal he had already become involved in and the work arranged for, that it was a pretty late time to come around then and repudiate the deal. As far as I was concerned, I had paid it anyway, because I had signed up on it and I did pay.

Question. Well before he stated to you that the Cordova Copper

Company had repudiated its contract with you in reference to this publicity account—publicity matter—how much money in accounts had you submitted to Mr. Smith as having been expended by you under the terms of that contract?

Mr. NAVE: I object upon the ground that he has shown by evidence that what he submitted was in writing.

306 Mr. JACOBS: I will confine it to that part orally submitted to him?

Answer. I would like to know what time you mean. I have had this up with him a great many times.

Question. Before he stated the Cordova Copper Company had repudiated its contract with you?

Answer. Well I had, of course, hired a number of men there, but as I remember the price I was to charge for the setting up of the stockholders' list that was to be typed or copied plus the mailing of the first 280 papers; and after mailing twenty-seven hundred papers, which I paid for, and it seems to me the only other thing I submitted at that time was the total amount he had agreed to pay under the contract—those four items, I think.

Question. That is not the only contract the Cordova Copper Company has repudiated with you, *it is*?

Answer. No, sir.

Question objected to by counsel for plaintiff upon the ground that it is immaterial. Question answered before the ob-ection.

Objection sustained.

Question. What was the amount of those items you have testified to?

Question objected to by counsel for plaintiff upon the ground that it has not been shown whether or not these items were submitted to him in writing.

307 Question. I asked him "Those items submitted."

Mr. NAVE: I ask permission to examine him upon his voir dire before the question is answered.

The COURT: You may.

Mr. NAVE:

Question. Did you submit bills covering those items to Mr. Smith at that time, Mr. Van Dyke.

Answer. As I remember it they only received this labor bill. I had a bill with items in it and took it up to Mr. Smith's room and discussed it with him and wanted him to make the payment himself on that thing particularly, and he said go ahead and pay it and charge it to our account.

Mr. NAVE: I object unless he shows the matter was in writing.

Question withdrawn.

Question. Now you say you had expended money for the Cordova Copper Company and that you spoke to Mr. Smith and submitted to

him the amount you had expended, and he told you to go ahead and pay it and charge to their account?

Answer. That particular bill.

Question. What was the amount of that?

Counsel for plaintiff objects to the question upon the ground that the written document is the best evidence.

Objection sustained.

Question. You say you submitted bills to him?

Answer. Yes, sir, I think I have.

Question. You have it where?

308 Answer. I think on file in my office. Let me tell you about this.

Mr. NAVE: No, let Mr. Jacobs ask you questions.

Question. I ask you now all the items, if you can tell, or amount, incurred and paid by you under the terms of your contract with the Cordova Copper Company in this publicity matter you have submitted to Mr. Smith orally?

Answer. Well, I have submitted nearly all these accounts to Mr. Smith orally, with the exception of a few of the last bills paid.

Question. You submitted nearly all?

Answer. Yes, sir.

Question. Orally?

Answer. Yes, sir. Well, when I say orally, I had a statement, audited statement, by Mr. Brooks; he reported the amounts I paid over to Mr. Ladd, he had these reports——

Question. Who has that audited statement?

Answer. I think Mr. Brooks has it in his possession.

Question. Mr. Brooks was bookkeeper for the Miami Townsite Company?

Answer. Yes, sir, and for me personally.

Question. And for yourself?

Answer. Yes, sir.

Question. Mr. Brooks is the man named in your affidavit for a continuance of this case?

Answer. Yes, sir.

Question. Who is down at the legislature?

309 Answer. Yes, sir.

Question. You say this is in his possession?

Answer. I don't know whether that is in his possession, but he has charge of it and it is not available to me. I don't know what he has done with it.

Question. You have been unable to find it?

Answer. I found some but not all.

Question. I am speaking of the audited account?

Answer. All we have been able to find is a typewritten copy of the audited account of the auditor's accounts of the Globe Bureau of Mines.

Question. Have you that with you?

Answer. I think I have a copy of it with me.

Question. What items of expense incurred by you as suggested before for the Cordova Copper Company did you submit to him orally?

Answer. Well, I submitted the first payment on the Le Roy A. Ladd account, which was made November 17th, 1909.

Question. What was the amount?

Answer. Three hundred dollars.

Mr. NAVE: I object to that until I can find out whether or not it was accompanied by a written statement, and ask permission to examine him on voir dire.

The COURT: Very well.

Mr. NAVE:

310 Question. You mean you may have submitted to him without submitting an account?

Answer. I submitted three hundred dollar amount concerning Mr. Ladd's account. I submitted that without a statement. I had no statement on that, judge; that was merely in accordance with my agreement. I told him I had already paid him three hundred dollars on that November 17th account, but this statement here was made from a bill rendered to me by the Silver Belt Company and I took that up with Mr. Smith and told him there were several items on that that belonged to him.

Mr. NAVE: I withdraw the objection.

Question read.

Question. Just the oral part?

Answer. Three hundred dollars on November 17th.

Question. Three hundred dollars on November 17th, what year?

Answer. 1909.

Question. What did Mr. Smith say to you at the time you submitted that three hundred dollar item?

Question objected to by counsel for plaintiff upon the ground that it has not been shown that Mr. Smith had any authority to speak for the company in the matter.

The COURT: The objection will be sustained at this time.

Mr. JACOBS: We reserve an exception.

Question. Let us go back to this last account. What is
311 the exact date upon which you advanced money to and for the use and benefit of the Cordova Copper Company?

Counsel for plaintiff objects to the question upon the ground that it involves the assumption that it was advanced for the use of the Cordova Copper Company.

Question. If you did advance money for the use and benefit of the Cordova Copper Company?

Counsel for plaintiff objects to the question upon the ground that there has been no authority shown for Mr. Van Dyke to advance money for the use and benefit of the Cordova Copper Company, and as calling for the opinion of the witness.

The COURT: The objection will be sustained at this time.

Question. Now I will ask you if you had any arrangement or agreement with Mr. Hoval A. Smith, while vice-president of the Cordova Copper Company in reference to the J— or Parker claim?
Answer. Yes, sir.
Question. And the Little Jay?
Answer. Yes, sir.
Question. And the M—?
Answer. Yes, sir.
Question. What was that agreement?
Answer. Well there were during the summer of 1909 certain jumpers went in and jumped this claim and established new claims, one they called the "Wolf" and the other was called the "Smoothing Iron."

Question. These claims were called that?

312 Answer. Yes, sir, these two new claims jumped, the Little Jay and the Mars and those claims, and he directed me to clean up these details.

Mr. NAVE:

Question. Were those claims covered by your option for the townsite?
Answer. You mean the Wolf and the Smoothing Iron. No, they were not in the option. They did not exist at that time; these people came in there afterwards.
Question. But claims you claimed, were they?
Answer. You mean——
Question. Were they part of your option, part of your Townsite Company?
Answer. I don't know what you mean.

Mr. NAVE: I ask the court's permission to examine him on voir dire.
The COURT: Very well.

Qualifying examination.

By Mr. NAVE:

Question. What was your three claims you say they jumped? Whose claims were the three they jumped?
Answer. If you will let me take a map I will show you.
Question. I don't want—Whose were they?
Answer. They were part of this arrangement, part of the Cordova Copper Company group that I had bonded for the Cordova Copper Company.

313 Question. Part of the group that is involved in this option arrangement?
Answer. Yes, sir.

Mr. NAVE: I object to any evidence on that line upon the ground that it comes within the general terms of the contract.
Objection sustained.

Question. Was this agreement between you and Mr. Smith a special and separate agreement on the part of Smith and aside from any other agreement that had been made in reference to this porperty?

Counsel for plaintiff objects to the question upon the ground that it is immaterial and calls for the opinion of the witness.
Objection sustained.
Exception by defendant.

Question. Mr. Van Dyke you paid, you delivered to Mr. Mike McCarthy, manager of the Cordova Copper Company, a check for five thousand dollars did you?
Answer. Yes, sir.
Question. At whose request did you deliver that check?
Answer. Mr. McCarthy's. I don't know whether I delivered it to him in person, but I delivered it to the company.
Question. That was in the form of an advance to the corporation?
Answer. Yes, sir.
Question. They offered to repay you interest on that five thousand dollars?
Answer. Yes, sir.
314 Question. Do you recollect about the time that five thousand dollars was advanced by you to Mr. McCarthy for the Cordova Copper Company?
Answer. In March my notes say—March 15th, nineteen hundred and——
Question. March 15th?
Answer. Yes, sir.
Question. What year?
Answer. I think 1910, I will verify that though.
Question. Now do you recollect any other papers, any other money advanced by you to the Cordova Copper Company.

Mr. NAVE: I object.
The COURT: It would be better to follow up your five thousand dollar item, Mr. Jacobs.

Question. Is that money still due and owing to you by the Cordova Copper Company?
Answer. Yes, sir.

Mr. NAVE: I move the answer be stricken from the record until I can make my objection.
The COURT: It may be stricken.
Mr. NAVE: I object to the question upon the ground that it calls for the opinion of the witness, as to whether it was due and owing.
The COURT: It is calling for a conclusion. The objection will be sustained.
Mr. NAVE: I now move that all the evidence with respect to the five thousand dollars which Mr. Van Dyke has given this morning be stricken upon the ground it is not shown to be the basis of any claim against us.

315 Mr. NAVE: Just a minute. There is one question I would like to ask Mr. Van Dyke on voir dire first:

Question. That is the same item of five thousand dollars you testified to a day or so ago? That is the same five thousand dollers?
Answer. Yes, sir.
Question. Which Mr. McCarthy asked you to pay upon certain accounts?
Answer. When I protested.
Question. The same item?
Answer. Yes, sir.

Mr. NAVE: I move that the evidence be stricken on the ground that it is not a claim under the counter-claim against us.
Mr. JACOBS: There is a conflict in the record, I think.
The COURT: Under the state of the record it seems to me the objection should be sustained.
Mr. NAVE: It is a motion to strike, your honor.
The COURT: It may be stricken.
Mr. JACOBS: I wish the record to show we reserve an exception.

Question. After you had entered into this contract with Mr. Hoveland up in Duluth, what, if anything, did the Cordova Copper Company, or Mr. Hoveland rather and his associates, do with this property described in the complaint or in the amended answer? Did they take possession of it?
Answer. Yes, sir, they did.

Mr. NAVE: Permit me to get in my objection. I ask the answer be stricken until I can object.
316 The COURT: It may be.
Mr. NAVE: I object to the question upon the ground that what the plaintiff did with this property cuts no figure.
Mr. JACOBS: It is merely preliminary.
The COURT: I don't quite understand what the question was. Will you read the question, Mr. Reporter?

Question read.

Mr. NAVE: It does not make any difference what they did under the issues as framed here.
The COURT: Wherein is it material, Mr. Jacobs?
Mr. JACOBS: It is preliminary leading up to an item of expenditures.
The COURT: Very well, he may answer it. The objection will be overruled.

Answer. Yes, sir.
Question. You say they had possession of it?
Answer. Yes, sir.
Question. They had engineers out there in charge of the property?
Answer. Yes, sir.
Question. And surveyors?
Answer. Yes, sir, and other men.

Question. Now who paid their engineers and their surveyors for the work that was performed there at that time?

Answer. The Cordova Copper Company.

Question. And the Cordova Copper Company has subsequently charged you with expenditures made for that purpose?

317 Answer. Yes, sir.

Question. What amount of those charges made against you——?

Mr. NAVE: I object to the question upon the ground that the amount of charges made against him does not make any difference.

Mr. JACOBS: I want to show they had agreed to pay this and did pay it, and when they got this advance of five thousand dollars from this defendant they grabbed it and rendered an account stating that they were charging it up against him on their accounts; that he protested to Mr. McCarthy——

Mr. NAVE: I will withdraw the objection. I will not allow any such implication against my clients as suggested by counsel.

Question. Give your answer.

Answer. You want just the total amount on that account?

Question. Yes, that they charged off against you?

Answer. (Witness starts to figure up the amount).

The COURT: We will postpone that answer until after dinner.

Jury admonished and noon recess taken.

After Recess.

Roll Call of jury. All present.

Mr. JACOBS: Now, where were we when we had to quit?

Question read.

Question. Now what was the total amount of the account for money expended by them on that property that they charged off against you?

318 Mr. NAVE: I object to that question. That is precisely what I am contending he can not do.

Mr. JACOBS: This was never paid by the Cordova Copper Company as they had agreed to pay when they received the money from Mr. Van Dyke, but they charged these accounts off against him.

The COURT: That is the property as described on which option was had and what the mineral rights were on?

Answer. Some is included in that description and some is not.

Question. Some——?

Answer. I can explain that.

Question. That about the property?

Answer. This was the bills for the amounts expended by the Cordova Copper Company during this summer when they were operating and paid to their engineers and to other workmen while they were in charge of the property, and is matters that was expended on that portion known as the townsite portion and the new locations.

Question. And the new locations?
Answer. Yes, sir.
Question. Expended by them?
Answer. Expended by them. I did not expend money for paying off of their engineers and other workmen. When they got money from me they charged it up against me.

Mr. NAVE: Go ahead.

Question. Now testify, Mr. Van Dyke, as to the question——?
319 Answer. They rendered a statement for the account, some of which charges were legitimate- charged against me and some of which were not. When this statement was received we segregated the charges in the statement, but we have here Mr. McCarthy's—this is a copy of the statement and I can check off with him what are chargeable against me and what are not.
Question. Now check those off and give me the amounts?
Answer. On page two of that statement there is $105.82.
Question. You are reading now from the statement rendered you by the Cordova Copper Company?
Answer. Yes, sir.
Question. All right?
Answer. $65.75.
Question. On page two?
Answer. On page -wo, following item $204.95. I wish to state that was engineering work done by the Cordova Copper Company on notes and maps and data.
Question. Charged that against you?
Answer. Charged back against me. Then during the time their engineers were making their survey they were attacked by Mr. Davis and Mr. Davis was arrested and put under a peace bond. The engineers were attacked by him and they put him in the care of a deputy sheriff two days until they could finish this surveying work, and there was $25.64 costs.
Question. That they paid for that?
320 Answer. That they paid at that time and that they charged back against me. Was not my engineers at all.
Question. How much was that amount?
Answer. $25.64. And the next item is work that they performed on location work for these new claims.
Question. New claims?
Answer. Yes, sir, they did work under their supervision with Mr. McCarthy as manager.
Question. And they charged that to you?
Answer. Yes, sir. $336.75. Next item is watchman's——
Question. That you have testified to?
Answer. Yes, sir.
Question. That is money they paid the watchman or you?
Answer. They paid this for the watchman, and my share of it was—They paid $128.00 and I took the watchman in order to even

up the thing and I paid him for the next period, and after allowing them $128 of what I paid they owed me on that account $250.

Mr. NAVE: That is the Stevens item you have already covered?

Answer. Yes, sir, that was discussed yesterday. Now the next item there is an item for cash advances.

Question. Cash advances by whom?

Answer. By them to me.

Question. Are those proper charges against you?

Answer. Some of them are, one is not. The first three
321 are proper charges against me; the last is not. $300 chargeable against them.

Question. $300 chargeable against them?

Answer. Yes, sir.

Question. And how much chargeable against you?

Answer. $50, $200 and $350, that is right.

Question. They have charged against you $300——?

Answer. $50, $200, $350 and $200, that is a total of $900. Six hundred of that is a legitimate charge against me and $300 is not.

Question. Explain to the jury how this is chargeable against you. Six hundred of this you are entitled to return?

Answer. No, six hundred is legitimately chargeable against me; that is right.

Question. And the rest of it should not?

Answer. And the rest of it should not.

Question. What is the amount that should not?

Answer. Three hundred dollars. Now on the next page there are some items charged that were miscellaneous items. There is $1.50 chargeable against them, supplies used by their own engineers, I never saw them in my life. First is $1.50, next copper tags, $3.00; hand axe, $1.75; thumb tacks, $1.70; one dozen pencils, 60 cents; two field books, $1.00; location notices, 25 cents; record books, $2.50; recording so many claims, $2.00; telegraphing, $18.09; stage fare for one of their engineers, $1.00. The next item——

322 Question. What is the total amount of that? Just estimate?

Answer. Next item is $2.10—$14 and $2.10.

Question. $48.09 minus $16.10. $31.99 is it? That is the way I have it here?

Answer. That first page is all charges made against me on the first page are legitimate, they should be charged to me; that is a house account and includes the work that their engineers did for me. Their engineers did some work for me on the townsite, or something pertaining to the townsite, and all charges of that kind are chargeable against me. Charges legitimate against them are what they did for the mining company, subject to their order. Now may I ask you a question judge?

The COURT: Yes. (Witness asks the question and resumes his seat on the witness stand).

Answer. I want to say that this work which was completed by account was just put in new, was done after their engineering corps was organized, but prior to that time work was done on special ac-

count, the same class of work, or some work of the same nature was done before that time under the direction of a local firm of engineers: Sultan & Wayne, and I have these items——

Question. Now who paid for that?

Answer. Well, that was paid for in this way: Part paid out of the two thousand dollars——

Question. First two thousand dollars you received from Mr. Hoveland?

Answer. Yes, sir, and the rest was paid by me personally.

323 Question. Now, how much of that was paid out of the first—Can you segregate it and tell me how much was out of the first two thousand received from Mr. Hoveland?

Colloquy between counsel.

Question. What was that?

Answer. This was some mining expense account, so there were two charges being run at the time; mining account and townsite account. This was the mining account and had nothing to do with the townsite at all.

Question. This was the mining end?

Answer. Has to do with the mineral end of it.

Question. Cordova end of it?

Answer. Yes, sir, absolutely, all of it.

Question. Now then what was the amount of that?

Answer. Well, I haven't got it all put in one amount.

Question. Run through it; that is the engineering of Sultan & Wayne?

Answer. The first item is $5.00——

Mr. NAVE: What is that for?

Answer. Tracing prints which were sent to Duluth.

Question. Who has the tracing prints?

Answer. They were left at the Duluth office of Mr. Hoveland.

Question. Then they charged them against you?

Answer. Yes, sir.

Question. Go ahead?

324 Answer. Surveying the Cordova Copper Company's claims——

Question. How much?

Answer. $150.00 and two prints of those claims $5.00. I have got their receipts for these.

Question. Who has the prints?

Answer. Well, I don't know about them.

Question. You don't know whether they retained possession of them or not?

Answer. No, I do not know about them. I have forgotten. Paid by cash on assessment account, $500.00.

Question. $500.00?

Answer. Yes.

Question. On those claims?

Answer. Yes, sir. Surveying two claims $25.00 and on same ac-

count $15.00. Then their proportion of $291.00 bill, of $291.00 was $30.50, the rest was chargeable against the townsite.

Question. On how large a bill?

Answer. $291.00 bill.

Question. What was that bill for?

Answer. Surveying some work done, $30.50 chargeable against the mining company and the balance against the townsite company.

Question. $30.50 chargeable against the mining company?

Question. Yes, sir. Now there was a balance due on that assessment work. You see I telegraphed this money for these people to be paid.

Question. That is Sultan & Wayne?

Answer. Yes, sir.

Question. From where?

325 Answer. Saint Paul.

Question. Out of that two thousand dollars?

Answer. Yes, sir. When I returned I paid a balance on that account due of $400.00.

Question. You paid a balance of $400.00?

Answer. Yes, sir.

Question. Did that all come out of the two thousand?

Answer. Well, now, that is three years ago and I do not know. I know seven hundred of it did. I telegraphed seven hundred of it. And then there was other location work on Crœsus and Bacus, forty dollars.

Question. That wasn't done by Sultan & Wayne?

Answer. No, but about that same time.

Question. Location work?

Answer. Forty dollars.

Mr. NAVE:

Question. Crœsus and Bacus?

Answer. Yes, sir. I have got receipts for this. (Witness leaves chair and asks some questions of the court. Witness resumes his seat). Now there were two items of clearing title and an item of what I call "Special Maintenance Account" which was expended in cleaning the ground of jumpers. These jumpers were not merely on my ground; that is, the townsite end of it, but they were over on some of the Eureka Group on the Switch Back, some of that ground; and

326 while the expense for protecting that wasn't the amount charged, at the same time it occurred at the same time and in clearing these titles.

Question. How much money was expended?

Answer. $70.05 expended I think.

Question. Chargeable to who?

Answer. Chargeable to the Cordova Copper Company. And there was three other small items. One for $29.30, one recording deed $1.75, filing notices $14.00, and the purchasing of timber for this assessment work that was done $15.40; and the assessment work on Copper Center——

Mr. NAVE: Is that one of the claims covering your property?

Answer. Yes, sir.

Mr. JACOBS: Same applies to this townsite property.
Mr. NAVE: All right. If we operated that property, of course.

Answer. I would like to ask Mr. McCarthy a question on this item before putting it in.

Colloquy between counsel.

Answer. Now those other two items. The other two items were for this clearing of titles, $300.00 and $230.00.

(Witness again leaves his chair to converse with the court. Witness resumes the chair).

Question. Now, what other items are there?
Answer. There is a five thousand dollar item. I understand that has been ruled on.

Colloquy between counsel.

327 Answer. There is only that five thousand dollars I paid that we can figure on here. There is only $1,070.90 of the five thousand dollars.
Question. $1,070.90 as against five thousand?
Mr. NAVE: You concede the charges, particularly of that five thousand dollars were just?
Answer. Yes, sir.
Mr. NAVE: And still you are trying to get it back?
Answer. No, sir. I explained that.
Question. After deducting that portion of the five thousand dollars applying on the items that you testified to that amounts to $1,070.90 as chargeable against that five thousand dollars, this leaves $3,929.10?
Answer. Yes, sir. Well now I mentioned these items a while ago which should be deducted out of that which is a legitimate charge against me. I mentioned them a while ago.

Mr. NAVE: I object to the proof of the three thousand as not a part of the five thousand.
The COURT: The court ruled on that this morning.
Mr. JACOBS: What I am trying to find out now is what items you have testified to here are proper charges against that five thousand dollars?
Mr. NAVE: What difference does it make?
Mr. JACOBS: I want to segregate them to get the record *srtaight*.
Mr. NAVE: I object to the question of the five thousand dol-
328 lars. That is out. Everything he is testifying to here; all the items, will have to stand or fall on their own merits.

Answer. You see there is five thousand dollars covering a balance of cash due in my favor there that I am entitled to receive.
Mr. NAVE: These items you are testifying to now.
Question. How much of that five thousand dollars is justly returnable to you now? I will withdraw that. How much of that five thousand dollars is properly offset by items you have testified to?

Question objected to by counsel for plaintiff upon the ground that it is immaterial.

Colloquy between court and counsel.

Answer. The difference between that and this account I have offered is the balance of cash that is legitimately due me on that account.

Question. Difference between what?

Mr. NAVE: I object to the question as to the proof of the items due him.

The COURT: That is the same thing. Amounts to the same.

Question. Out of this two thousand dollars that you received in this first two thousand in Duluth, you say you paid seven hundred of that on some of these accounts?

Colloquy between counsel.

Question withdrawn.

Question. There is an item included in that five thousand dollars which you intended they should pay back?

329 Mr. NAVE: I object to any evidence with respect to that five thousand dollars as a lump item.

The COURT: It is calling for an opinion. He may give separate items.

Answer. Well, now, Judge, I have given those items, and I have given besides those items the items justly chargeable against them and what was chargeable justly against me. I have given that; put it in the record. Now the other balance due me is a balance which remains of the five thousand dollars which should be credited to me as cash item. They claim twenty-five hundred dollars on that belongs to me and I claim more than that.

Colloquy between court and counsel.

Mr. NAVE: Let him be cross-examined upon this operating expense at the present time then I will turn him over to you.

Mr. JACOBS: Now there is another item coming under another head of $2,515.66 cash advanced. That is properly chargeable by you against the company is it not?

Answer. Yes, sir.

Mr. NAVE: I ask that the answer be stricken until I can make my objection.

The COURT: It may be stricken.

Mr. NAVE: I object to that question upon the ground that it calls for a conclusion of law from the witness.

Question. I call your attention to an item of $2,515.66.

Mr. NAVE: This item we have credited in our complaint.

330 Mr. JACOBS: That is an item you say has been credited, which we deny.

Question. You know what that item is?

Answer. Yes, sir.

Question. What is that?
Answer. That is a portion of the five thousand dollars that was rned over to Mr. McCarthy that Mr. Fairchild receipted to me as eing on account.
Question. On account?
Answer. Yes.
Question. And that amounts to $2,515.66?
Answer. Yes.
Question. That is a portion of that five thousand dollars they claim ou are entitled to as cash from them?
Answer. Yes, sir.
Question. Now what other money is there?

Mr. NAVE: I move that all the testimony given with respect to he $2,515.66 be stricken from the record upon the ground that it loes not tend in anywise to support the claim.
The COURT: The motion will be granted.
Mr. JACOBS: Exception.

Question. Now are there any other items of account Mr. Van Dyke?
Answer. There are other items.
Question. What are they?
Answer. They have been ruled out.
Question. They have been ruled out?
Answer. Yes, sir.
Question. But what amounts were they? In amounts giving names?

331 Mr. NAVE: I object to him going into items that he knows have been ruled out.
The COURT: They have already been ruled out.
Mr. JACOBS: That is his opinion. I don't know whether they have been ruled out or not. I want to know what is stricken out, what is excluded and what is in here. (Mr. Jacobs talks with Mr. Van Dyke.)
Mr. JACOBS: May it please the court, inasmuch as the court has ruled excluding over seven thousand dollars of what we claim is a just and valid account against these plaintiffs, and wishing to preserve our rights as to our counter-claim, we desire at this time to dismiss the counter-claim and cross-complaint, it being impossible for us to recover under it in this action.
The COURT: Very well.
Mr. JACOBS: It is understood that this counter-claim is dismissed without prejudice?
The COURT: Yes.

Recess taken to 3:15 p. m. in order to enable counsel to prepare special instructions.

After recess. Roll call of jury. All present.

The COURT: Proceed with your argument, gentlemen.
Counsel for plaintiff concludes his opening argument.

The COURT: It is so near five o'clock that we will not start any further argument this afternoon, but will take recess until 9:30 a. m.

MAY 4TH, 1912.

After recess. Roll call of jury. All present.

After argument.

332 *Charge to the Jury.*

GENTLEMEN OF THE JURY: It will take the court just a few moments to instruct you in this case.

This case, as it now stands, is to be submitted to you upon the complaint of the Cordova Copper Company and the answer of Van Dyke to that complaint. In the complaint the Cordova Copper Company sets up three separate demands, one in the sum of two thousand dollars, one in the sum of five thousand dollars and one in the sum of ten thousand dollars, aggregating seventeen thousand dollars, together with interest thereon as set forth in the complaint, upon which, however, as set forth in the complaint, has been credited as payment of $2,515.66.

In determining whether or not the defendant is indebted to the plaintiff as claimed by the plaintiff, you are to understand that it is incumbent upon the plaintiff to satisfy you as to the merits of its demand by a preponderance of the evidence.

A civil case is unlike a criminal case in this respect: That, whereas, in a criminal case the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt before it can return a verdict of guilty, in a civil case such complete certainty of the truth of the matter is not required.

You are to decide this case in favor of the plaintiff, if upon the greater weight of the evidence the plaintiff is entitled to the decision. The greater weight of the evidence is not necessarily affected by the number of witnesses or number of items of evidence brought
333 forward by either side to a law suit, but is determined by the degree of the persuasiveness of the evidence—by the extent to which it gives you belief in its truth. If to that extent the plaintiff has persuaded you as to the truth of its demand, you should return a verdict in favor of the plaintiff.

By the law you are made the sole judges of the credibility of the witnesses and shall give to the testimony of each witness and to the various items of documentary evidence in the case such credit as in your honest judgment it is fairly entitled to. If you believe that any witness has willfully sworn falsely to any material matter you are permitted to disregard his testimony unless it is corroborated by other credible evidence in the case.

You are hereby instructed that the rights of the parties to this action are to be determined as they existed at the time of the commencement of this action.

You are further instructed that if you find from the evidence that

the contract, as to the matter of repayment of money advanced, entered into between Henry B. Hoveland and the defendant, Cleve W. Van Dyke, in the month of January, 1909, in Duluth, Minnesota, is the contract testified to by the said Henry B. Hoveland, then you should find a verdict for the plaintiff in this action. If on the contrary you find from the evidence that the contract entered into by the said Henry B. Hoveland and the defendant, Cleve W. Van Dyke, in the said month of January, 1909, as to the matter of repay-
334 ment of money advanced, is not the contract testified to by the said Henry B. Hoveland, then it is your duty to find and render a verdict in this case for the defendant, Cleve W. Van Dyke.

An oral contract is just as binding as a contract in writing, unless the subject of the contract is required by law to be in writing.

This action is not based upon a contract required to be in writing; therefore, I instruct you that either the contract testified to by Mr. Hoveland or Van Dyke, in so far as the same relates to the matter of the repayment of money advanced, though not in writing, is binding upon the parties to this action for the purpose of this case.

As the case is presented to you, the sole question is whether the defendant should pay the plaintiff the sum of $15,364.75 with interest thereon from the 24th day of March, 1910, at the rate of 6 per cent. per annum. You must find for the plaintiff either in the entire amount or not at all.

For your convenience I have caused two forms of verdict to be prepared in returning one of which you may find for the plaintiff in that sum and in returning the other of which you may find for the defendant.

When you have retired you should select one of your members as foreman, and when you have agreed upon a verdict, cause your foreman to sign that verdict and return with it in court. Your verdict must be unanimous.

335 Title of Court and Cause.

Reporter's Certificate.

I, T. G. Cecil, official reporter of the above entitled court, do hereby certify that I was present at the trial of the above entitled proceeding on April 29th and 30th, and May 1st, 2nd, 3rd, and 4th, A. D., 1912; that I took shorthand notes of all pertinent oral matters and testimony adduced at said proceeding, and that the foregoing two hundred and twenty-nine (229) pages of typewritten matter is a full, true and correct record of said trial, reported and transcribed to the best of my skill and ability.

T. G. CECIL.

June 17th, 1912.

336 In the Superior Court of Gila County, State of Arizona.

No. 2028.

CORDOVA COPPER COMPANY, a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Judge's Certificate.

The foregoing transcript of evidence in the above entitled cause is approved and certified by me as a correct statement of the evidence in said proceeding.
Dated Sept. 4, 1912.

A. G. McALISTER, *Judge.*

Received by me for approval on Tuesday the 27th day of August, 1912.
June 17th, 1912.

A. G. McALISTER,
Trial Judge.

Filed June 29, 1912.

337 And on the same day, to-wit: the sixteenth day of September, 1912, came the appellant by his attorneys and filed in the Clerk's office of said Court in said entitled cause, certain Instructions requested by Plaintiff and Defendant, in words and figures following, to-wit:

In the Superior Court of Gila County, State of Arizona.

CORDOVA COPPER CO., a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Instruction Requested by Plaintiff.

Now comes the Cordova Copper Company, plaintiff, and requests the Court to direct Jury to return a verdict for the plaintiff in accordance with the prayer of his complaint, to-wit, for the sum of $15,364.75 with interest thereon from March 24, 1910, at the rate of 6% per annum.

NAVE & CAMPBELL,
Attorneys for Plaintiff.

Refused.
A. G. McALISTER, *Judge.*

338 Title of Court and Cause.

Instructions Requested by Plaintiff.

Comes now the Cordova Copper Co., plaintiff in the above entitled cause, and, the Court having refused to give the plaintiff's heretofore requested instruction to the jury to return a verdict in favor of the plaintiff and without waiving the request for such directed verdict presents the following instructions and request the same as appropriate for the submission of the issue to the jury:

GENTLEMEN OF THE JURY: This case, as it now stands, is to be submitted to you upon the complaint of the Cordova Copper Company and the answer of Van Dyke to that complaint. In the complaint the Cordova Copper Company sets up three separate demands, one in the sum of $2,000.00, one in the sum of $5,000.00, and one in the sum of $10,000.00, aggregating $17,000.00, together with interest thereon as set forth in the complaint, upon which however as set forth in the complaint, has been credited a payment of $2,515.66.

In determining whether or not the defendant is indebted to the plaintiff as claimed by the plaintiff, you are to understand that it is incumbent upon the plaintiff to satisfy you as to the merits of its demand by a preponderance of the evidence. A civil case is
339 unlike a criminal case in this respect, that whereas in a criminal case the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt before it can return a verdict of guilty, in a civil case such complete certainty of the truth of the matter is not required. You are to decide this case in favor of the plaintiff if upon the greater weight of the evidence the plaintiff is entitled to the decision. The greater weight of the evidence is not necessarily affected by the number of witnesses or number of items of evidence brought forward by either side to a lawsuit but is determined by the degree of the persuasiveness of the evidence—by the extent to which it gives you belief in its truth. If to that extent the plaintiff has persuaded you as to the truth of its demand you should return a verdict in favor of the plaintiff.

By the law you are made the sole judges of the credibility of the witnesses and shall give to the testimony of each witness and to the various items of documentary evidence in the case such credit as in your honest judgment it is fairly entitled to. If you believe that any witness has wilfully sworn falsely to any material matter, you are permitted to disregard his testimony unless it is corroborated by other credible evidence in the case.

Given.

A. G. McALISTER, *Judge.*

340 As the case is presented to you, the sole question is whether the defendant should pay the plaintiff the sum of $15,364.75 with interest thereon from the 24th day of March, 1910, at the rate of 6% per annum. You must find for the plaintiff either in the

entire amount or not at all. For your convenience I have caused two forms of verdict to be prepared in returning one of which you may find for the plaintiff in that sum and in returning the other of which you may find for the defendant.

When you have retired you should select one of your members as foreman and when you have agreed upon a verdict, cause your foreman to sign that verdict and return with it in court. Your verdict must be unanimous.

NAVE & CAMPBELL,
Attorneys for the Plaintiff.

Given.

A. G. McALISTER, *Judge.*

341 Superior Court, Gila County, State of Arizona.

CORDOVA COPPER CO., a Corporation, Plaintiff,
vs.
CLEVE W. VAN DYKE, Defendant.

Instructions Requested by Defendant.

You are hereby instructed that the rights of the parties to this action are to be determined as they existed at the time of the commencement of this action.

F. C. JACOBS,
Att'y for Defendant.

Given.

A. G. McALISTER, *Judge.*

An oral contract is just as binding as a contract in writing, unless the subject of the contract is required by law to be in writing.

This action is not based upon a contract required to be in writing, therefore, I instruct you that either the contract testified to by Mr. Hovland or Mr. Van Dyke in so far as the same relates to the matter of the repayment of money advanced though not in writing is binding upon the parties to this action for the purposes of this case.

342 The foregoing instruction requested by defendant is assented to by plaintiff, provided there be inserted after the words "Van Dyke" the following: "in so far as the same relates to the matter of the repayment of money advanced"; but the same is resisted as not stating the law unless so modified.

NAVE & CAMPBELL,
Attorneys for Plaintiff.

Given as modified.

A. G. McALISTER, *Judge.*

GENTLEMEN OF THE JURY: You are hereby instructed that if you find from the evidence that the contract as to the matter of repayment of money advanced, entered into between Henry B. Hovland and the defendant Cleve W. Van Dyke in the month of January,

1909, in Duluth, Minnesota, is the contract testified to by the said Henry B. Hovland, then you should find a verdict for the plaintiff in this action. If on the contrary you find from the evidence that the contract entered into by the said Henry B. Hovland and the defendant Cleve W. Van Dyke in the said month of January, 1909, as to the matter of repayment of money advanced, is not the contract testified to by the said Henry B. Hovland, then it is your duty to find and render a verdict in this case for the defendant, Cleve W. Van Dyke.

The foregoing instruction, without the ink interlineations,
343 having been requested by defendant, now comes plaintiff and requests that the same be modified as interlined and formally assents to the giving of the same so modified.

NAVE & CAMPBELL,
Attorneys for Plaintiff.

Given as modified.

A. G. McALISTER, *Judge.*

And on to-wit: the twenty-eighth day of April, 1913 being one of the regular juridical days of the Supreme Court of Arizona, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

CLEVE W. VAN DYKE, Appellant,
vs.
CORDOVA COPPER COMPANY, a Corporation, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered
344 the same, and being fully advised in the premises:

It is Ordered that the judgment of the trial court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein, do have and recover of and from Cleve W. Van Dyke, appellant herein, and the Southwestern Surety Insurance Company of Oklahoma, surety on bond on appeal herein, the sum of fifteen thousand three hundred sixty-four and 75/100 ($15,364.75) dollars, with interest thereon from the 24th day of March, A. D., 1910, at the rate of six per cent (6%) per annum and its costs in the trial court taxed at two hundred ninety-eight and 55/100 ($298.55) dollars, with interest thereon at the rate of six per cent (6%) per annum from May 4th, 1912, until paid, together with its costs in this court, taxed at ninety-four ($94.00) dollars.

And on the same day to-wit: the twenty-eighth day of April, 1913, there was filed in the clerk's office of said Supreme Court in said entitled cause a certain Opinion in words and figures following, to-wit:

345 In the Supreme Court of the State of Arizona.

No. 1279.

CLEVE W. VAN DYKE, Appellant,
vs.
CORDOVA COPPER COMPANY, a Corporation, Appellee.

Appeal from the Superior Court of the State of Arizona in and for Gila County.

A. G. McAlister, Judge.

Affirmed.

Statement of Facts by the Court.

The appellee as plaintiff commenced this action to recover judgment for a balance alleged to be due from the appellant as defendant upon three loans made to defendant alleged to be due and unpaid with interest.

The defendant resisted, denying the indebtedness is due, and as a defense he sets forth a contract by which the money claimed is alleged to have been paid to him, and by which the same shall be repaid, if at all, and alleges that the money under the conditions of the contract is not due nor payable.

On April 26, 1912 defendant filed a cross-complaint setting up a counter-claim for money paid to, and for the use and benefit of, plaintiff, at its instance and request and demands judgment.

346 A trial was had before the court with a jury, and was commenced on April 30, 1912. After the commencement of the trial on the said April 30, defendant moved for a postponement of the trial, for the reasons alleged, that he was not prepared to make proof of the facts alleged in his counter-claim on account of the necessary absence of a material witness, who alone could testify to the facts therein set forth. The motion to postpone the trial was denied, and on May 2, 1912, and while the trial was in progress the defendant moved to dismiss the cross-complaint without prejudice, which motion was granted.

On May 4, 1912, the jury rendered its verdict for the plaintiff, and on the same day a judgment was ordered upon the verdict. On May 16, 1912, defendant moved for a new trial, which motion was by the court ordered stricken from the files, upon motion of the plaintiff. The defendant gave notice of appeal in open court from the judgment "and order granting motion to strike the motion for a new trial," which notice was entered on the record. The bond on appeal recites that defendant "has appealed to the Supreme Court of the State of Arizona from said judgment. * * *" The bond describes the judgment alone.

F. C. Jacobs, for appellant.
John H. Campbell and L. L. Hayden, for appellee.

347 CUNNINGHAM, *J.*:

The appeal in this cause is from the judgment alone, and we have no jurisdiction to review upon this appeal orders made subsequent to the judgment.

Miami Copper Company vs. Strohl, 130 Pac. 605; (recently decided by this court).

Arizon E. R. R. Co. vs. Globe Hardware Co., 129 Pac. 1104; (decided by this court Feb. 17, 1913).

Appellant assigns as error the order of the court striking out the motion for a new trial, and the appellee has moved to dismiss the supposed appeal from such order. The motion for a new trial was made in time. Pars. 1478 and 1496, Rev. St. Ariz. 1901, as amended by Chapter 21, Laws of the First Session of the First State Legislature, approved and in effect May 8, 1912. The motion was therefore properly before the court for trial. The order to strike the motion was equivalent to and in effect was a dismissal of the proceeding for a new trial. The order should not have been made. Warden vs. Mendocino Co. 32 Cal. 655; Calderwood vs. Peyster, 42 Cal. 111; Voll vs. Hollis, 60 Cal. 569.

We are precluded from a consideration of the effects of this erroneous ruling of the court upon this motion in this appeal, for the reason an order of the court dismissing a motion for a new trial is equivalent to a denial of the motion for a new trial, and
348 such order is subject to appeal; or such order is reviewable upon an appeal from an order refusing a new trial.

Voll vs. Hollis, supra;
Lang vs. Superior Court, 71 Cal. 492;
Winchester vs. Black, 134 Cal. 125, 127;
Credit Com. Co. vs. Superior Court, 140 Cal. 83;
Galbraith vs. Lowe, 142 Cal. 295, 299;
Wyman vs. Jensen, 26 Mont. 228, 240;
United States vs. Trabing, 3 Wyo. 144, 146;
1 Haynes New Trial, sec. 165, page 864.
Ashton vs. Thompson, 28 Minn. 333.

No appeal has been perfected from such order. The appellant gave notice of appeal, but failed to describe the order in the bond, and failed to recite in the bond that any appeal was prosecuted from such order. No suit could be maintained upon this appeal bond for a failure to prosecute the appeal from the order refusing the motion for a new trial in such case. Land Co. vs. Ansley, 6 Tex. Civ. App. 185.

No appeal from the order having been perfected there appears to be nothing before the court upon which appellee's motion to dismiss can operate.

The first and third assignments of error relate to the ruling of the court refusing a continuance on account of the absence of a
349 material witness who alone could establish the allegations of the cross-complaint; and to the ruling of the court in per-

mitting plaintiff to answer the cross-complaint. The record discloses that during the trial of the cause the appellant voluntarily dismissed his cross-complaint without prejudice. Appellant has waived all errors that may have been committed in reference to the cross-complaint.

Appellant assigns numerous errors based upon the ruling of the court in admitting and rejecting evidence, and upon errors alleged to have been committed in instructions to the jury. Such rulings and action of the court are reviewable upon the trial of a motion for a new trial, and they are reviewable in this court only upon appeal from an order refusing a new trial.

Miami Copper Co. vs. Strohl, 130 Pac. 605;
Ariz. E. R. R. Co. vs. Globe Hardware Co., 129 Pac. 1104.

This appeal having been prosecuted from the judgment alone, we are limited to a consideration of those manifest and fundamental errors that appear upon the record composing the judgment roll, and any intermediate order where properly presented for review.

Miami Copper Co. vs. Strohl, supra;
Ariz. E. R. R. Co. vs. Globe Hardware Co., supra;
Kinney vs. Nies, 127 Pac. 719.

We have carefully considered the judgment roll and have
350 discovered no reversible error therein, and counsel has pointed out no such error to the court, therefore the judgment appealed from must be affirmed.

D. L. CUNNINGHAM, *Judge.*

We concur:
ALFRED FRANKLIN,
Chief Justice,
HENRY D. ROSS, *Judge.*

And on to-wit: the 12th day of May, 1913, came the appellant by his attorneys and filed in the clerk's office of said Court in said entitled cause a certain Motion for Re-hearing in words and figures following, to-wit:

351 No. 1279.

In the Supreme Court of the State of Arizona.

CLEVE W. VAN DYKE, Appellant,
vs.
CORDOVA COPPER COMPANY, a Corporation, Appellee.

Motion for Rehearing.

Comes now the appellant in the above entitled cause by his counsel, F. C. Jacobs and Sloan, Seabury and Westervelt, and respectfully moves the Court to grant a rehearing in said cause and in behalf of said motion his said Counsel specify the following reasons therefor:

I.

The decision of the Court that the appeal bond in this case is insufficient to confer jurisdiction upon the Court to review any error assigned, not apparent upon the face of the record, establishes a new precedent, is far reaching, and of general interest in that it affects appeals now pending and also judgments heretofore rendered by this Court in cases in which the appeal bonds were and are substantially identical with the bond in this case. In view, therefore, of the importance of the decision upon the practice and its possible
352 effect upon the validity of judgments heretofore rendered and also upon pending appeals, counsel for appellant urge that before the matter be finally and conclusively settled and decided, they be given an opportunity to present additional authorities and argument bearing upon the question to the end that, if possible, there may be a re-examination of the question in the light that may be afforded the Court by such re-argument, either oral or by brief, as the Court may decide.

In making this request, counsel have in mind the rule that an Appellate Court will not ordinarily grant a rehearing except where new or additional authorities are to be presented upon some question of law, or when it is apparent that some matter, either of law or of fact, through omission of counsel or by inadvertence or oversight, was not fully presented and considered by the Court. We most respectfully and earnestly insist that this is such a case. In this behalf we also suggest that there can be no valid objection to a rehearing that may be urged by appellee inasmuch as it is fully and amply protected by the bond in question and no harm can come to it by reason of any delay that may be occasioned by the granting of this motion. Further, the probability that the Court, upon a review of the errors assigned, will find reversible error in the record, and particularly in the instructions of the Trial Court, is so great,
353 that we feel fully justified in suggesting that in this case justice will be subserved by a rehearing.

II.

Counsel for appellant aver that upon a rehearing they will show that the appeal bond in this case is in substantial harmony with the practice that has prevailed in this jurisdiction since 1887, when the Texas Practice Act was, for the most part, incorporated into our Territorial law; that the practice has remained the same since the amendment to Par. 1493, Rev. Sts. noted by the Court in Miami Copper Company vs. Strohl. Upon this showing counsel will present authorities to sustain the proposition that this contemporaneous construction of the statute long acquiesced in is, in itself, sufficient to validate the practice heretofore followed in the matter of appeal bonds.

Counsel also will show that the Texas Practice, at the time of the adoption of the statutes of that State by Arizona, had been settled by judicial construction of these statutes, and that under this settled practice any other bond than that given in this case would have been defective. Counsel will further show that inasmuch as no change was

made in the provisions relating to appeal and supersedeas bonds by the revision of 1901, the true rule of construction in such a case, as laid down by the authorities, is that such unamended pro-
354 visions of the statute are to be regarded as continued with the same effect and with the construction theretofore given them by the Courts. Counsel aver that they will also show, as they confidently believe, that the Arizona statutes are fundamentally different from those of California, Montana, Idaho and Wyoming, and that the cases from these States relied upon by the counsel for appellee in his brief and cited by this Honorable Court in its opinion are therefore inapplicable; and furthermore, that the practice in these States with regard to appeal bonds can not be incorporated into our own without fundamentally changing the statutory provisions, and, therefore, without judicial legislation.

III.

Counsel, as an additional reason for a rehearing, call the attention of this Honorable Court to the fact that in its opinion it refers to the record disclosing that a motion for a new trial was duly made, and within the statutory time, and upon this finding of fact, suggest to the Court the propriety and disirability of a reargument of the case upon the point whether a review of the errors assigned may not properly be made by the Court in this case, whether or not an appeal has been perfected from the order overruling the motion for a new trial, if that be required. In this behalf counsel for appellant will show, both by reason and by authority, as we verily believe,
355 that under our statutes the Court has jurisdiction to review such assignments of error and, in its discretion, may properly do so in a case like this in which the record discloses that the Trial Court was given an opportunity to correct its errors before the judgment became final. This point does not appear to have been heretofore called to the attention of the Court, although sufficiently important, in itself, as we firmly believe, to call for the granting of a rehearing.

In urging this motion for the reasons given, Counsel do not mean to imply any criticism upon the Court in rendering its opinion. In view of the seeming strength of authority in support of the position taken by counsel for appellee and the somewhat mixed nature of our statutes on the subject of appeals, due to the fact that they have been taken from different States, it might well have happened that the Court failed to overlook or to give consideration to the viewpoints above suggested. As we have already suggested, we appreciate fully that the very purpose of a motion for rehearing is to afford an opportunity for a fuller discussion and the presentation of new or additional authorities in just such a case as this. For this reason we unhesitatingly request the Court to grant us a rehearing in the
356 full confidence and belief that this will be granted.

Respectfully submitted,

F. C. JACOBS,
SLOAN, SEABURY AND
WESTERVELT,
Counsel for Appellant.

In the Supreme Court of the State of Arizona.

No. 1279.

CLEVE W. VAN DYKE, Appellant,
vs.
CORDOVA COPPER COMPANY, a Corporation, Appellee.

Motion for Rehearing.

STATE OF ARIZONA,
County of Maricopa, ss:

Richard E. Sloan, being first duly sworn, deposes and says that he is one of the Counsel for Appellant in the above entitled cause; that on the 8th day of May, 1913, he served a copy of the foregoing Motion for Rehearing on Honorable John H. Campbell, one of the attorneys of record of the Appellee, the Cordova Copper Company, a corporation, by depositing the same on said day in the Post office at Phœnix, Arizona, in an envelope duly enclosed, with the
357 requisite stamps thereon, plainly addressed on said envelope to said Honorable John H. Campbell, at Tucson, Arizona, the same being his place of residence.

RICHARD E. SLOAN.

Subscribed and sworn to before me this 10th day of May, 1913.

[SEAL.] JOS. S. JENCKES,
Notary Public.

My Commission expires Feb'y 16, 1916.

And on to-wit: the 23rd day of May, 1913, being one of the regular juridical days of said court, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:—

Title of Cause.

At this day it is ordered that the motion for re-hearing filed herein by appellant be, and the same is hereby denied.

358 And on to-wit: the second day of June, 1913, came the appellant by his attorneys and filed in the clerk's office of said court in said entitled cause a certain Petition for Writ of Error, Assignment of Errors and Order allowing Writ of Error, in words and figures following, to-wit:

In the Supreme Court of the State of Arizona.

CLEVE W. VAN DYKE, Plaintiff in Error,
vs.
CORDOVA COPPER COMPANY, a Corporation, Defendant in Error.

To the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona:

Now comes Cleve W. Van Dyke, plaintiff in error in the above entitled cause, by his attorneys, and respectfully shows that on the 28th day of April 1913, in the case wherein said Cleve W. Van Dyke was appellant and the Cordova Copper Company, a corporation, was appellee, which cause was appealed from the Superior Court in and for Gila County, State of Arizona, the Honorable, the Supreme Court of the State of Arizona, entered judgment against your petitioner and in favor of said Cordova Copper Company, affirming the
359 judgment theretofore entered in said cause against your petitioner in favor of said Cordova Copper Company in said Superior Court, Gila County, State of Arizona, in the sum of $15,364.75 with interest and costs. Your petitioner feeling himself aggrieved by the said judgment entered, as aforesaid, herewith petitions for an order allowing him to prosecute his Writ of Error to the Supreme Court of the United States, under the laws of the United States, in such cases made and provided, the said cause having been begun prior to the admission of the State.

Wherefore, the premises considered, your petitioner prays that a writ of error do issue for the correction of the errors complained of and herewith assigned, and that an order be made, fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond, as may be required, that all further proceedings may be suspended until the determination of said writ of error by the said Supreme Court of the United States.

SLOAN, SEABURY & WESTERVELT,
Attorneys for Petitioner in Error.

360 Title of Court and Cause.

To the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona:

Now comes Cleve W. Van Dyke, plaintiff in error, in the above entitled cause, in connection with his petition for a writ of error in this cause, and assigns the following errors, which plaintiff in error avers occurred in the proceedings and judgment rendered in the said cause, and upon which he relies to reverse the said judgment entered herein, as appears of record:

First. That the Supreme Court of Arizona erred in holding that, for the reason that the bond on appeal failed to recite that the appeal was taken from the order striking the motion for a new trial filed by

plaintiff in error, it had no jurisdiction to review the assignments of error made by plaintiff in error upon said appeal.

Second. That said Court erred in failing to reverse the judgment of the Trial Court and in failing to grant a new trial herein because there were manifest errors committed by said Trial Court preserved in the record of said appeal, properly assigned as error and presented to said Court in briefs of counsel (but which were not considered by said Trial Court in the motion for a new trial filed by plaintiff in error, because of the error of said Trial Court in striking said motion from the files), and, therefore, said Supreme Court in refusing to consider and pass upon said errors, so assigned, committed error prejudicial to plaintiff in error.

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Third. That said Court erred in refusing to reverse the judgment of the Trial Court and grant a new trial herein because of prejudicial and harmful errors committed by said Trial Court which appear in the record on appeal to said Supreme Court, and which were properly reviewable by said Supreme Court, and which said errors were, as follows:

(1) Because it appears from the record in said cause that the Trial Court erred in striking the motion for a new trial filed by plaintiff in error, without passing upon its merits, thus depriving plaintiff in error of his right to have said motion considered and the rulings of the Court complained of and presented in said motion reviewed by said Trial Court.

(2) Because the Trial Court erred in this, that upon the trial of the action, the issue of fact under the pleadings between the parties was as to the terms and conditions of the agreement, under which the money sued for was paid by defendant in error to plaintiff in error and received by plaintiff in error; it being claimed and testified to by plaintiff in error that said money was paid under the terms of an agreement by which, as the consideration for said payment, defendant in error was to secure certain mineral rights to certain mining claims owned by plaintiff in error, and to receive certain preferred shares of stock in a company thereafter to be organized. On the other hand, it was claimed by the defendant in error that the said money was paid under an agreement that said money was to be repaid from the proceeds of the sale of certain town lots and other property to be acquired by said company, and that said mineral rights were to be acquired by defendant in error as a bonus for advancing said money; that the testimony established that the agreement, whatever it may have been, was entered into by and between plaintiff in error and one Hoveland in January, 1909, in the City of Duluth, State of Minnesota; that during the trial, David L. Fairchild, was called as a witness for defendant in error and over objection was permitted to testify that in December, 1908, he was present at a conversation had between plaintiff in error and one Hoval A. Smith, in which plaintiff in error stated that he was anxious to raise money to take care of a certain option he had in property in the Miami District, Arizona, where he proposed to float and sell a town

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site, and that he would sell his mineral rights connected with
363 said property for the sum of Ten Thousand Dollars ($10,000)
and return the money for the Ten Thousand Dollars ($10,000) subsequently; that counsel for plaintiff in error moved the Court to strike said testimony upon the ground that the same was irrelevant and immaterial and appertained to a conversation that occurred before said agreement, whatever it may have been, was entered into between plaintiff in error and said Hoveland; that said motion to strike was denied by the Trial Court, and an exception to said ruling duly taken by plaintiff in error; that thereafter said plaintiff in error was placed upon the stand, and was asked by his counsel to state what was said by himself or by Mr. Smith in the conversation testified to by Mr. Fairchild, relative to the sale of the mineral rights in question. Whereupon, counsel for defendant in error objected to the said question and to any testimony in relation to said conversation upon the ground that it was immaterial and irrelevant. Whereupon, the Trial Court sustained the said objection. Whereupon, the counsel for plaintiff in error duly excepted to said ruling. That said ruling of the Court, under the circumstances, was prejudicial error in that the plaintiff in error was not permitted to state his recollection of the
conversation testified to by the witness Fairchild, and the testi-
364 mony of the latter stood uncontradicted and unanswered, although it tended to establish in the minds of the jurors the truth of the contention of the defendant in error as to the contract made in January, 1909.

(3) Because the Trial Court erred in instructing the jury, as follows:

"This case, as it now stands, is to be submitted to you upon the complaint of the Cordova Copper Company and the answer of Van Dyke to that complaint. In the complaint the Cordova Copper Company sets up three separate demands, one in the sum of two thousand dollars, one in the sum of five thousand dollars and one in the sum of ten thousand dollars, aggregating seventeen thousand dollars, together with interest thereon as set forth in the complaint, upon which, however, as set forth in the complaint, has been credited as payment of $2,515.66."

* * * * * * *

"You are further instructed that if you find from the evidence that the contract, as to the matter of repayment of money advanced, entered into between Henry B. Hoveland, and the defendant, Cleve W. Van Dyke, in the month of January, 1909, in Duluth, Minnesota, is the contract testified to by the said Henry B. Hove-
365 land, then you should find a verdict for the plaintiff in this action. If on the contrary you find from the evidence that the contract entered into by the said Henry B. Hoveland and the defendant, Cleve W. Van Dyke in the said month of January, 1909, as to the matter of repayment of money advanced, is not the contract testified to by the said Henry B. Hoveland, then it is your duty to find and render a verdict in this case for the defendant, Cleve W. Van Dyke.

An oral contract is just as binding as a contract in writing, unless the subject of the contract is required by law to be in writing.

This action is not based upon a contract required to be in writing; therefore, I instruct you that either the contract testified to by Mr. Hoveland or Van Dyke, in so far as the same relates to the matter of the repayment of money advanced, though not in writing, is binding upon the parties to this action for the purpose of this case.

As the case is presented to you, the sole question is whether the defendant should pay the plaintiff the sum of $15,364.75 with interest thereon from the 24th day of March, 1909, at the rate of 6 per cent. per annum. You must find for the plaintiff either in the entire amount or not at all."

366 That said instructions were prejudicial and harmful to plaintiff in error in this, that the evidence disclosed that there were issues of fact raised as to the terms and conditions under which the money sued for was paid to plaintiff in error, and as to the terms of the contract between the parties hereto in relation to said money, and the instruction wholly ignores the said issues of fact and narrows the controversy to the one question as to whether the contract in relation to which one Hoveland a witness of the defendant in error testified, was the contract entered into between the said witness, representing the defendant in error, and the plaintiff in error in the month of January 1909; and are harmful and prejudicial in this further regard that the jury was instructed that the sole question in the case was whether the plaintiff in error should pay the defendant in error the precise sum sued for, disregarding and ignoring all other issues of fact arising under the pleadings and under the testimony had in the case; and, further that there were no other instructions given by the Court that in any way cured the error committed by the Court in the instructions above set forth.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court of the State of Arizona be reversed, and that
367 the case be remanded to the Trial Court, with instructions to grant a new trial therein.

SLOAN, SEABURY & WESTERVELT,
Solicitors for Plaintiff in Error,
Phœnix, Arizona.

In the Supreme Court of the State of Arizona.

CLEVE W. VAN DYKE, Plaintiff in Error,
vs.
CORDOVA COPPER COMPANY, a Corporation, Defendant in Error.

On this 31st day of May, 1913, came on to be heard the application of Cleve W. Van Dyke, the plaintiff in error in the above entitled cause, said plaintiff being represented by counsel, for a writ of error; and it appearing from the petition filed herein and the record filed herewith, that the application ought to be granted and

that a transcript of the record and proceedings and the papers upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in said petition, that such proceedings may be had as may be just in the premises.

368 It is, therefore, Ordered That the writ of error be allowed, upon the plaintiff in error giving a bond conditioned, as the law directs in the sum of Twenty-five Thousand Dollars *Dollars* ($25,000.00) which said bond shall be a supersedeas bond and when given shall stay all further proceedings in the cause; and that a true copy of the record, assignment of errors and of the proceedings had in the case in the Supreme Court of the State of Arizona, shall be submitted to the Supreme Court of the United States, properly certified, as the law directs to the end that the said Court may inspect the same and do that which, according to law, should be done.

Dated at the City of Phœnix, Arizona, this 31st day of May, 1913.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court
of the State of Arizona.

And on to-wit: the first day of July, 1913, there was filed in the Clerk's office of said Court in said entitled cause a certain Bond in words and figures following, to-wit:

369 Know all men by these presents: That we, Cleve W. Van Dyke, as principal, and W. D. Fisk and L. D. Van Dyke, of Gila County, Arizona, as sureties, are held and firmly bound unto Cordova Copper Company, a corporation in the full and just sum of Twenty five Thousand Dollars ($25,000.00) to be paid to the said Cordova Copper Company, a corporation, its certain attorney, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 26th day of June in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the Supreme Court of the State of Arizona, in a suit pending in said court between Cleve W. Van Dyke, appellant, and Cordova Copper Company, a corporation, appellee, a judgment was rendered against said Cleve W. Van Dyke, and the said Cleve W. Van Dyke having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Cordova Copper Company, a corporation, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within sixty days from the date thereof.

370 Now, the condition of the above obligation is such that if the said Cleve W. Van Dyke shall prosecute his writ of error to effect and answer all damages and costs, if he shall fail to

make his plea good, then the obligation to be void, else to remain in full force and virtue.

CLEVE W. VAN DYKE, *Principal.*
W. D. FISK,
L. D. VAN DYKE,
Sureties.

Sealed and delivered in presence of
R. L. ALDERMAN.
LOUISE L. ROSS.
FRED J. ELLIOTT.

Approved by
ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

UNITED STATES OF AMERICA,
State of Arizona, County of Gila, ss:

W. D. Fisk and L. D. Van Dyke, the sureties named in the above and foregoing bond being severally duly sworn, each for himself and not one for the other deposes and says that he is a citizen of the United States of America and a resident of the County of Gila, State of Arizona in the United States of America; that he is a free-
371 holder and householder in said County of Gila and State of Arizona; that he is the owner in fee of real property situated in the County of Gila, State of Arizona of the value of more than $25,000.00, and that he is worth the said sum of $25,000.00 over and above all his debts and liabilities exclusive of property exempt from execution.

W. D. FISK.
L. D. VAN DYKE.

Subscribed and sworn to before me this 26th day of June, 1913. My commission expires Feb. 23/1916.
[SEAL.] MARY KAVANAUGH,
Notary Public in and for Gila County, State of Arizona.

372 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
State of Arizona, ss:

I, J. P. Dillon, Clerk of the Supreme Court of the State of Arizona, by virtue of the Writ of Error attached hereunto, and in obedience thereto, do hereby certify the above and foregoing to be a full, true and complete copy and transcript of the record in a certain cause lately pending in said court, No. 1279, wherein Cleve W. Van Dyke was appellant, and the Cordova Copper Company, a cor-

poration, was appellee, including the Judgment Roll, Reporter's Transcript of Testimony, Instructions requested by Plaintiff and Defendant, Judgment of Supreme Court, Opinion, Motion for Re-hearing, Order denying Motion for Re-hearing, Petition for Writ of Error, Assignment of Errors, Order allowing Writ of Error, and Bond, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

I further certify that the attached Writ of Error, Citation and Order of Enlargement, are the original instruments filed in said Supreme Court in said above entitled cause.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 18th day of September, A. D., 1913, at Phœnix, Arizona.

[Seal Supreme Court, State of Arizona.]

J. P. DILLON,
Clerk Supreme Court of Arizona.

373 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arizona, in the case of Cleve W. Van Dyke, Appellant vs. Cordova Copper Company, a corporation, Appellee, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Cleve W. Van Dyke, Appellant vs. Cordova Copper Company, a

374 Corporation, Appellee, wherein a judgment was entered in favor of said appelle- and against said appellant, in the sum of $15,364.75 with interest and costs and affirming the judgment of the Superior Court in and for the County of Gila, State of Arizona, in a suit brought in the District Court of the Fifth Judicial District of the Territory of Arizona, which was pending in said latter named court, at the time the said Territory of Arizona was admitted into the Union as the State of Arizona, and which said judgment of said Supreme Court, affirming said judgment of said Superi- Court in a cause begun in said Territorial District Court and involving an amount exceeding Five Thousand Dollars ($5,000) exclusive of costs, is, therefore, reviewable by this Court under and by virtue of the terms of the Act of Congress approved June 20th, 1910; and, wherein, a manifest error hath happened to the great damage of the said Cleve W. Van Dyke, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable *Melville W. Fuller*, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, District of Arizona.]

ALLAN B. JAYNES,
Clerk U. S. Dist. Court, District of Arizona,
By FRANK E. McCRARY, *Deputy.*

Allowed by

HONORABLE ALFRED FRANKLIN,
Chief Justice of the Supreme Court
of the State of Arizona.

375 [Endorsed:] No. 1279. In the Supreme Court, State of Arizona. Cleve W. Van Dyke vs. Cordova Copper Company, a corporation. Writ of Error. Filed Jul- 1, 1913. J. P. Dillon, Clerk Supreme Court.

376 UNITED STATES OF AMERICA, *ss:*

To Cordova Copper Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Arizona wherein Cleve W. Van Dyke is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, this first day of July, in the year of our Lord one thousand nine hundred and thirteen.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court
of the State of Arizona.

377 [Endorsed:] No. 1279. In the Supreme Court, State of Arizona. Citation. Filed July 9th, 1913. J. P. Dillon, Clerk Supreme Court. Service by copy acknowledged this 3rd day of July, 1913. Cordova Copper Co., a corporation, By John H. Campbell, Its Attorney.

378 In the Supreme Court of the United States.

CLEVE W. VAN DYKE, Plaintiff in Error,
vs.
CORDOVA COPPER COMPANY, a Corporation, Defendant in Error.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named plaintiff in error having sued out a writ of error to the Supreme Court of the State of Arizona from the judgment of the said Supreme Court of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered that the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be and the same is hereby enlarged until and including the 29th day of September, 1913, and the return day of the Citation heretofore filed and served in said cause is hereby enlarged and extended until said last named day.

Dated August 21, 1913.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

379 [Endorsed:] No. 1279. In the Supreme Court, State of Arizona. Cleve W. Van Dyke vs. Cordova Copper Company. Order extending time for Docketing and Filing Record. Filed Aug. 21, 1913. J. P. Dillon, Clerk, Supreme Court, by Angie B. Byrne, née Parker, Deputy.

Endorsed on cover: File No. 23,886. Arizona Supreme Court. Term No. 735. Cleve W. Van Dyke, plaintiff in error, vs. Cordova Copper Company. Filed October 8th, 1913. File No. 23,886.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 735.

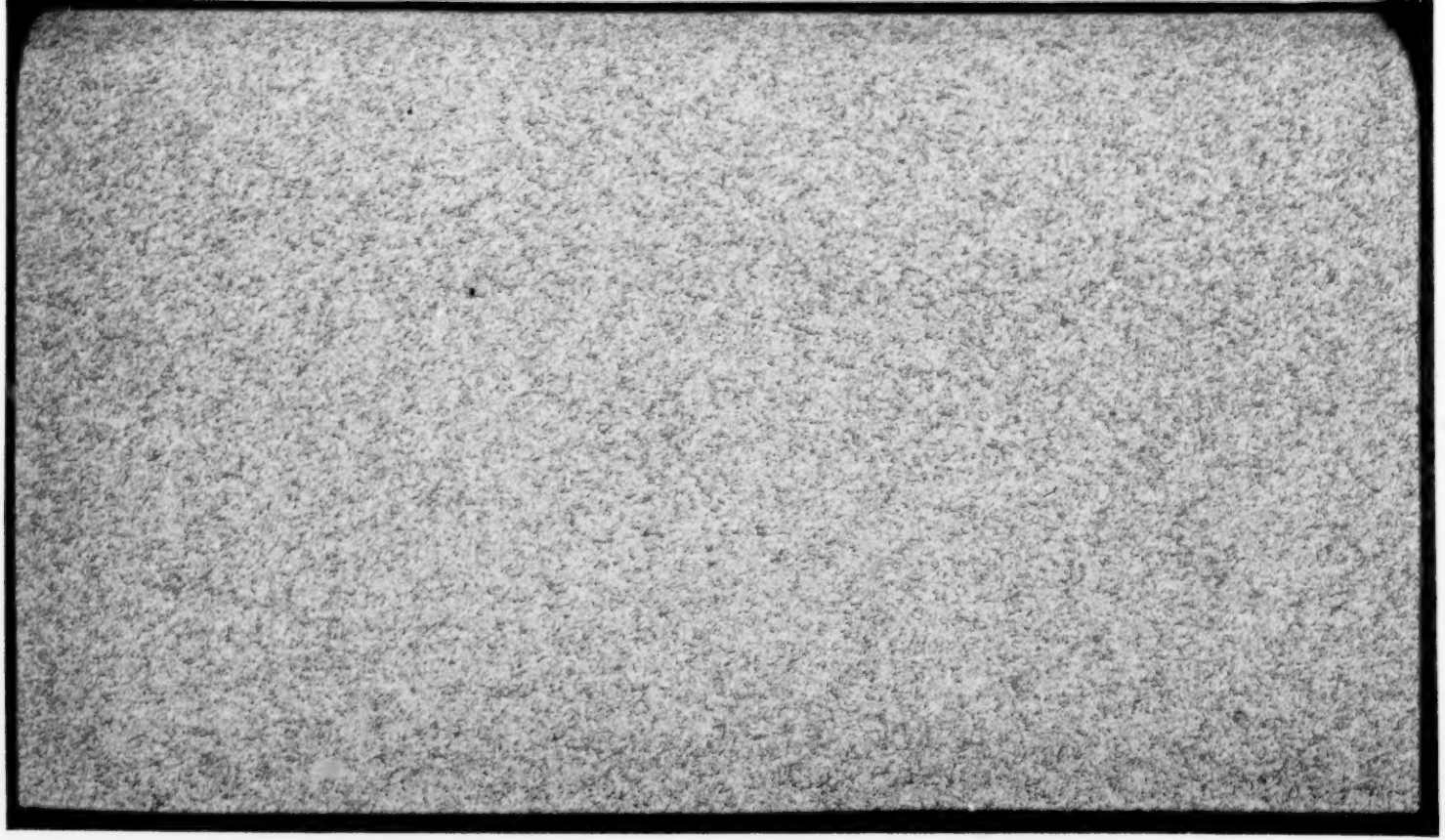
CLEVE W. VAN DYKE, PLAINTIFF IN ERROR,

vs.

CORDOVA COPPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

MOTION TO DISMISS AND BRIEF IN SUPPORT.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 735.

CLEVE W. VAN DYKE, PLAINTIFF IN ERROR,

vs.

CORDOVA COPPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

Counsel for the defendant in error moves that this writ of error be dismissed.

This was a contract action, brought by defendant in error in the District Court of the Fifth Judicial District of the Territory of Arizona on December 2, 1911, to recover the sum of $15,364.75, being the unpaid balance of sums loaned the defendant therein by the plaintiff company (R., 1-3). The defense was an alleged oral contract between defendant and the president of plaintiff company by

the terms of which the money was not yet due or payable (R., 4-9).

The case was tried in April and May, 1912, after the admission of Arizona as a State (R., 15-24). The trial therefore took place in the Superior Court of Gila County, State of Arizona, the territorial district court having gone out of existence (R., 28). The jury found a verdict for the plaintiff company (R., 25), and defendant moved for a new trial (R., 13). Upon the motion of plaintiff company, the motion for a new trial was stricken (R., 26). Defendant thereupon took an appeal to the Supreme Court of the State, and filed an appeal bond (R., 13, 26).

In the State Supreme Court error was assigned to the order of the court below striking out the motion for a new trial and to various rulings of that court in admitting and rejecting evidence and in instructions to the jury (R., 13, 176-178). The Supreme Court, pointing out that the appeal as described in the appeal bond (R., 13-14) was from the judgment alone and not from the order striking out the motion for a new trial, held that although that order was erroneous it was unable to consider that error on the appeal taken. For the same reason it was held that the other errors assigned could not be considered, since the rulings of the trial court complained of were only reviewable upon appeal from an order refusing a new trial (R., 177, 178).

Plaintiff in error now assigns as error the holding of the State Supreme Court that the errors committed by the trial court were not reviewable upon the appeal taken (R., 182-185). It is thus seen that the only question involved is a matter of local practice; that no right, privilege, or immunity is asserted under the Constitution or laws of the United States, and that no Federal question is made or attempted to be made. The sole question upon this motion, therefore, is whether this writ of error lies under the provisions of the Arizona Enabling Act of June 20, 1910 (36 Stat., 557).

Section 32 of that act (36 Stat., 576), after providing for the disposition of appeals and writs of error from the territorial courts pending in this court or the Circuit Court of Appeals at the time of admission, and for the succession of the Federal and State courts created by the act to the former territorial courts, declares:

> "That from all judgments and decrees or other determinations of any court of the said *Territory*, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the Circuit Court of Appeals as they would have had by law prior to the admission of said State into the Union."

It is only on the assumption that the present case comes within the class of cases here mentioned that the writ of error can be maintained. Ob-

viously, however, the judgment here is not a judgment "of any court of the said Territory," but a judgment of the Supreme Court of the State of Arizona. It is only by substituting the word "State" for "Territory" in the section that the instant case can be brought within this provision. Plaintiff in error may urge the necessity of this substitution by reason of the phrase "in any case begun prior to admission," contending that a case decided by a territorial court was necessarily begun prior to admission, and hence that the phrase quoted is surplusage unless the change be made. This surely affords no ground for this court to rewrite the section.

Moreover, the unsoundness of the suggested construction of section 32 is demonstrated by a glance at the following section (36 Stat., 577), which provides in part:

> * * * "That all cases pending and undisposed of in the Supreme Court of the said Territory at the time of the admission thereof as a State shall be transferred, together with the records thereof, to the highest appellate court of the State, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by State courts." * * *

In other words, a case which at the time of admission had reached the Supreme Court of the Territory on appeal, but was not yet determined there, could only be taken to this court if it involved a Federal question. Yet, according to plaintiff in error's contention, a case just docketed in the trial court of the Territory before admission could be taken up to the State Supreme Court and then be brought to this court without a Federal question. In other words, cases barely begun are to be preferred to cases fought through to the highest territorial court before admission. This *reductio ad absurdum* reinforces the view that Congress meant what it said in section 32, and intended thereby to allow an appeal or writ of error to this court in the absence of a Federal question only where the case had gone to judgment in the territorial court but the appeal or writ of error had not been perfected prior to admission.

This question was involved in *Northern Pacific R. R. Co. vs. Holmes*, 155 U. S., 137. There judgment had been perfected in the Supreme Court of Washington Territory and a petition for a rehearing was pending upon the admission of Washington as a State. This petition was denied by the State Supreme Court, and a writ of error from this court was sued out. Although section 22 of the Washington Enabling Act (quoted in the margin of the opinion at page 139) contained substantially the same provision as that here relied on, this court had no difficulty in concluding that

as no Federal question was involved the writ of error to the State court did not lie.

It is therefore submitted that the present writ of error should be dismissed.

W. J. HUGHES,
KARL W. KIRCHWEY,
Attorneys for Defendant in Error.

JOHN H. CAMPBELL,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913.

No. 735

CLEVE W. VAN DYKE, Plaintiff in Error,

vs.

CORDOVA COPPER COMPANY, a Corporation,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTION TO DISMISS.

RICHARD E. SLOAN,
JAMES WESTERVELT,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1913.

No. 735

CLEVE W. VAN DYKE, Plaintiff in Error,

vs.

CORDOVA COPPER COMPANY, a Corporation, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTION TO DISMISS.

The question, raised by defendant in error in its motion to dismiss, whether this Court has jurisdiction to review the judgment of the Supreme Court of the State of Arizona rendered in the above entitled cause, is to be determined by reference to the provisions of the Act of Congress, approved June 20, 1910, and known as the "New Mexico and Arizona Enabling Act" (36 Stat. at Large, 568). The language of this Act, particularly with respect to its provisions as to the trans-

fer of causes pending at the time of admission of Arizona as a State, and their disposition after admission, differs from that of other Enabling Acts, as an inspection of these will disclose, and hence, we are unable to cite decisions that bear directly upon the question here presented. The intent of Congress with regard to the disposition of causes pending in the Territorial District Courts at the time of admission is, as we admit, not altogether clear, yet we contend that jurisdiction to review the judgment in question is conferred therein upon this Honorable Court, if not in express terms, then, by implication.

> Section 32 of the Act provides: "That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper Circuit Court of Appeals upon any record from the Supreme Court of said Territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a District Court of said Territory, or in any matter of habeas corpus, upon any return or order of a district judge thereof, and all and singular the cases aforesaid which hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper Circuit Court

of Appeals, may be heard and determined by the Supreme Court of the United States or the proper Circuit Court of Appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the Circuit Court of Appeals to the Circuit or District Court hereby established within the said State, or to the Supreme Court of such State, as the nature of the case may require. And the Circuit, District and State Courts herein named shall, respectively, be the successors of the Supreme Court and of the District Courts of said Territory as to all such cases arising within the limits embraced within the jurisdiction of said Courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any Court of the said Territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the Circuit Court of Appeals as they would have had by law prior to the admission of said State into the Union".

The whole controversy as to jurisdiction, as we take it, hinges upon the construction to be given to the section quoted, and particularly the con-

cluding sentence beginning with the clause: "And the Circuit, District and State courts herein named shall, respectively, be the successors of the Supreme Court and of the District Courts of said Territory, etc."

We contend that the meaning and intent of the section, as expressed in the last part thereof, beginning with the clause: "And that from all judgments and decrees and other determinations of any court of said Territory in any case begun prior to admission," etc., is that the right to prosecute an appeal or writ of error to this court, as also to the Circuit Court of Appeals, extends to all cases pending in the courts of the Territory whether they had gone to judgment or had not gone to judgment at the time of admission, provided such right existed as to such cases prior to the admission of the State into the Union. Any other construction so narrows the meaning and intent of the section as to make it necessary that we disregard as altogether meaningless and useless, the phrase "in any case begun prior to admission," and, furthermore, disregard the context and particularly, the preceding clause of the sentence, providing that the State courts should be the successors of the Territorial courts as to all cases arising within the jurisdiction of said courts. Our contention is that the phrase "any court of the said Territory" is limited by the preceding clause,

declaring the Circuit, District and State courts to be the successors of the Supreme and District courts of said Territory, thus giving the whole sentence the meaning that an appeal or writ of error may be taken to this Court or the Court of Appeals, as the nature of the case may require, from a judgment, decree or other determination of any court of the said Territory, **or of any successor of such court,** in any case begun prior to admission, when its nature is such that under the prior law such an appeal or writ of error was permitted to be prosecuted.

It is a general canon of construction that a statute is to be interpreted so that, if possible, every clause or phrase shall have an intelligible meaning, and this rule is based upon the very proper assumption that the law-making body that enacted it intended by the use of any such clause or phrase to express some thought or meaning which without it would be unexpressed. In the application of this rule it is sometimes necessary to enlarge or to restrict, as the case may be, the meaning of a word, phrase, or clause, when this may be done without violence to the meaning of the language used, and the purpose and intent of the statute considered as a whole. In other words, when a limitation of a clause or phrase to its literal import has the effect of rendering another clause or phrase in the same section or statute without

meaning, ambiguous, absurd or useless, its meaning will be enlarged, if possible, so as to render such other clause or phrase of some utility as expressing the intent of the law-making body. We must assume that Congress, in making use of the words "in any case begun prior to admission," had in mind the obvious fact that a Territorial court, as such, would be **functus officio** immediately upon the admission of the State, and, therefore, would have no jurisdiction to enter any judgment, decree or other determination whatever in any case begun either prior to or after admission. Therefore, if we narrow the meaning of the words "of any court of the said Territory," to this literal import, then the clause "in any case begun prior to admission" is altogether without meaning, for as we have said, no suit could be begun in any Territorial court after admission.

However, as to all causes of action arising in the Territory, and which had ~~occured~~ accrued prior to admission, Congress had the power to make such provision as it saw fit relative to their determination after admission, and might have conferred jurisdiction upon the Federal courts to try and determine all such cases without regard to their nature, or it might, as it did, confer jurisdiction over such cases both upon the Federal courts and upon the State courts, depending upon their nature. Not only so, but it was within the power of Congress

as to all such cases, to continue in force and effect, as far as possible, the right of appeal which existed as to such cases under the law prior to admission. Of course, the acquiescence of the State was needed, in so far as Congress attempted to confer juristion upon State courts; but, as that consent was given, we may regard the State courts as the successors of the Territorial courts by virtue of the Act in question. When it is considered, therefore, that Congress with the consent of the State, possessed the power to provide that certain State courts should be the successors of the Territorial courts and, as such, empowered to try and determine causes of action which had accrued prior to admission, and that it did so provide in express terms, we contend that no violence is done to the meaning of the words "any court of the said Territory" by enlarging their scope to include such successors. On the contrary, by this interpretation, we give force and meaning to the clause of the same sentence "in any case begun prior to admission," and obviate the necessity of discarding the latter as altogether useless and meaningless.

If we are correct in this construction of the statute, then this case is one that comes within the jurisdiction of this Court to review upon the writ of error. It was begun in the District Court of the Territory prior to admission, judgment was

entered by the Superior Court of the State, the successor of the said District Court, which judgment was affirmed by the Supreme Court of the State, the successor under said Act of the Supreme Court of said Territory; and as the amount involved exceeded Five Thousand Dollars ($5000) exclusive of interest and costs, under the law in force prior to admission, this Court had jurisdiction to review said judgment and by the terms of the Act has retained such jurisdiction.

Counsel for defendant in error in their brief appear to take the view that said Section 32 is to be construed merely as allowing an appeal or writ of error to this Court in any case begun prior to admission which had gone to judgment in a Territorial court and in which the appeal or writ of error, as the case may be, had been perfected prior to admission, unless it involved some question arising under the Constitution and laws of the United States. They argue that any other view would lead to the absurd conclusion that the Act gives a preference to cases which had merely been begun in the Territorial courts over cases which before admission had been decided in the District Courts of the Territory and were at the time of admission pending in the Supreme Court of the Territory. This **reductio ad absurdum**, however, is based upon the narrow view taken of the statute by counsel for defendant in error upon assumed

premises of their own and not upon the construction we have given Section 32. They argue that Section 33 of the Act implies that all cases pending and undisposed of in the courts of the Territory at the time of admission are to be transferred to the Federal and State courts, depending upon their nature, and thereafter are to be disposed of exactly as though they had been begun after admission. A careful reading of Section 33 will, as we contend, show that it is not to be construed reasonably as a limitation upon the broad right to prosecute appeals or writs of error to this Court after admission granted by Section 32, as the right existed prior to admission, but that its purpose was to provide for the proper transfer of all such cases to the Federal or State courts having jurisdiction to try and determine them. Section 32, having clearly granted the right to prosecute appeals and writs of error from the judgments of the District Courts of the Territory and also of the Supreme Court of the Territory, to the same extent and as fully as permitted by law prior to the admission of the State, it is not to be assumed that Congress would in the very next section take away this right. As repeals by implication are not favored, we should rather seek, as we contend, to reconcile the two sections so as to give force and effect to both. The law prior to admission did not permit the prosecution of an appeal or writ of error to this Court from a final

judgment of the Supreme Court of the Territory except where the amount in dispute exceeded $5,000 unless the case involved the validity of some patent or copyright of the United States, or the validity of some treaty or statute of, or some authority exercised under, the United States (1 Supp. R. S. U. S., p. 485). There was, therefore, under the law prior to admission a class of cases in which Federal questions might be involved, which could not be brought to this Court by appeal or writ of error from the Supreme Court of the Territory, the amount in dispute in such cases, exclusive of costs, not exceeding the sum of $5,000. As we understand it, appeals from the judgments of State Supreme Courts to this Court will lie in cases involving questions arising under the Constitution or laws of the United States other than those involving the validity of a patent, copyright, treaty or statute of the United States or of some authority exercised under the United States, and without limit as to the amounts sought to be recovered in the suits in which they are rendered. It seems to us that Section 33, therefore, instead of being a limitation of the provisions of Section 32, may be considered reasonably as an enlargement of the right of appeal granted by Section 32. That is to say, the provision of said Section 32 that "all cases pending and undisposed of in the Supreme Court of said Territory at the time of the admis-

sion thereof as a State shall be transferred, together with the records thereof, to the highest Appellate Court of the State and shall be heard and determined thereby and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by said courts" might as easily and more reasonably be enlarged so as to include the class of cases which, although they might involve Federal questions, yet, by the limitation upon the amount in dispute, could not under the Territorial law be reviewed by this Court. If this view of Section 32 is not to be entertained because it is not to be assumed that Congress would discriminate between cases pending and undetermined in the Supreme Court of the Territory at the time of admission and the other cases mentioned and included within the provisions of Section 32, then we suggest that the clause "in accordance with the rules and principles applicable to the review by that tribunal of cases determined by said courts" may, in view of the provisions of Section 32, be held not to be intended to apply to the class of cases that may be reviewed, but to the form and mode of procedure provided for the review by this Court of cases determined by State courts. The term, "in accordance with the rules and principles applicable to the review . . ."

would then be given the same meaning as though it read "in accordance with the rules and regulations as to form and mode of procedure applicable to the review of cases determined by State courts." This view is strengthened when we look at the provision in Section 33 that cases pending in the Supreme Court of the Territory at the time of admission in which the United States is a party or which, if brought in a State would fall within the exclusive original cognizance of a Circuit or District Court of the United States were to be tried and decided by the Circuit Court of Appeals, and the further provision that the judgments of the latter court in most cases were made reviewable by this Court "in like manner and with like effect" as if they had been decided by the Supreme Court of the Territory. There does not seem to be any good reason why the latter cases should be reviewed by this Court as under the law appertaining to the judgments of the Supreme Court of the Territory prior to admission, while cases transferred to the State Supreme Court should be reviewed by this Court only as under the law governing the review by this Court of judgments of State courts.

Counsel for defendant in error in their brief cite the case of Northern Pacific Railroad Company vs. Holmes, 155 U. S., 137, in support of their contention that the appeal in this case being taken

from the judgment of the Supreme Court of the State and involving no Federal question, it does not come within the class of cases reviewable by this Court under the Enabling Act.

The Enabling Act for the State of Washington differs so materially from that of the Enabling Act of the State of Arizona, with respect to the provisions relating to appeals to and writs of error from this Court, in cases pending at the time of admission, that the case cited is no authority upon the question involved herein.

In the first place, there is no expression in the Washington Enabling Act of similar import to the phrase "in any case begun prior to admission" found in the Arizona Enabling Act. In the second place, the provision in the Washington Enabling Act permitting the prosecution of appeals and writs of error to this Court from the judgments and decrees of the Supreme Court of the Territory of Washington reads: "The parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State." While in the Arizona Enabling Act it is provided that the parties to any judgment rendered by any court of the Territory in any case brought prior to admission shall have the same right to prosecute such appeals and writs of error "as they would have

had by law prior to the admission of said State." The language of the former provision imports that the judgments referred to were to be those that should be rendered prior to admission, while the language of the latter provision is such as to admit of the thought that the judgments referred to should include those that should be rendered after admission; the words "as they shall have had" implying that the right shall accrue prior to admission, while the language "as they would have had" implying that by reason of the admission of the State the right given to prosecute such appeals and writs of error may not accrue prior to admission. Whether we are right in this or not, at any rate, we submit that the latter phrase is quite consistent with the meaning we attach to Section 32 of the Arizona Enabling Act, considered as a whole.

We respectfully submit, therefore, that this Court has jurisdiction in this case and the motion to dismiss should be denied.

RICHARD E. SLOAN,
JAMES WESTERVELT,
Attorneys for Plantiff in Error.

VAN DYKE *v.* CORDOVA COPPER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 735. Motion to dismiss submitted May 11, 1914.—Decided June 8, 1914.

Although words may be superfluous, if the statute be construed in accordance with the obvious intent of Congress, the courts should not, simply in order to make them effective, give them a meaning that is repugnant to the statute looked at as a whole, and destructive of its purpose.

Under §§ 32 and 33 of the Arizona Enabling Act of June 20, 1910, the judgment of the state court in a case transferred to it from the

territorial court is not reviewable by this court simply because it was pending in the territorial court at the time of the Enabling Act: such a judgment can only be reviewed by this court where a Federal question exists to give jurisdiction as in the case of judgments from the courts of other States.

Writ of error to review, 14 Arizona, 499, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the courts of a State rendered after statehood in cases transferred from the territorial court, are stated in the opinion.

Mr. William J. Hughes, Mr. John H. Campbell and *Mr. Karl W. Kirchwey*, for defendant in error, in support of the motion.

Mr. Richard E. Sloan and *Mr. James Westervelt*, for plaintiff in error, in opposition to the motion.

Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.

This action was brought on December 2, 1911, by the Cordova Copper Company in the "District Court of the Fifth Judicial District of the Territory of Arizona in and for the County of Gila" to recover sums of money alleged to have been loaned to Van Dyke, the plaintiff in error, and remaining unpaid. The case was tried in April and May, 1912, after the admission of Arizona as a State, in the "superior court of Gila county, State of Arizona" and resulted in a verdict on May 4 for $15,364.75, upon which judgment was entered on the same day. On May 16, Van Dyke moved for a new trial, which motion was at the instance of the Company stricken from the files. An appeal was taken to the Supreme Court of the State. The court, deciding that the appeal was taken alone from the judgment and that there was no reversible error in the

judgment roll, held that it could not review errors which were alone susceptible of being reviewed upon an appeal from an order refusing a new trial, although treating the motion to strike out as equivalent to such refusal, and the judgment was consequently affirmed. This writ of error was then prosecuted and the case is before us on a motion to dismiss.

Neither in the assignments of error nor in the argument at bar is it asserted that Federal rights were raised or involved in the court below, but the assertion that the case is within our jurisdiction rests solely upon the provisions of §§ 32 and 33 of the Arizona Enabling Act of June 20, 1910, c. 310, 36 Stats., pp. 557, 576, 577. The sections in question, generally speaking, provide for the trial of cases pending at the time of admission to Statehood and for their transfer to the appropriate courts established under the new system, and the particular language upon which the controversy turns is this:

". . . and that from all judgments and decrees or other determinations of any court of the said Territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals, writs of error, and petitions for review to the Supreme Court of the United States or to the circuit court of appeals as they would have had by law prior to the admission of said State into the Union."

The contention is that as this case was "begun prior to admission" and is one which in consequence of the amount involved might have been brought to this court from a judgment of the Supreme Court of the Territory, therefore it comes within the express terms of the statute and there is jurisdiction. But conceding the premise we think the conclusion is clearly in conflict with the plain language of the provision relied upon. We say this because the right to prosecute writs of error conferred is limited to "judgments and decrees or other determinations of any court of

the said territory," thus obviously excluding the right to review in a case like this where although "begun prior to admission," the case was tried after the conferring of statehood and judgment rendered in a state court. It may indeed be, as suggested in the argument, that to thus construe the provision renders superfluous the phrase "in any cause begun prior to admission," since in the nature of things no judgment could be rendered by a territorial court unless the action had been brought prior to the admission of Arizona as a State. But we may not in order to give effect to those words virtually destroy the meaning of the entire context, that is, give them a significance which would be clearly repugnant to the statute looked at as a whole and destructive of its obvious intent. The statute was enacted for a two-fold purpose, first, to save the right of appeal which had arisen and was in existence in cases decided prior to statehood in the methods contemplated by existing laws, and second, to appropriately distribute and provide for the transfer of untried and pending causes to the new courts which would come into existence under the new system. Passing the question of power to so do, it could not be assumed except as the result of the most unequivocal direction to that end that the statute was intended to create a new and strange method of procedure unknown to our constitutional system of government by which the judgments to be rendered by state courts in cases which the statute contemplated should be transferred to such courts for trial, should be reviewed, not according to the methods provided by the state law for such judgments, but by the Federal courts, although no Federal question of any kind was present to give such courts jurisdiction. That no such anomaly could possibly have been contemplated is shown by the proviso of § 33 of the act making cases in the Supreme Court of the Territory which were pending at the time of Statehood and which were transferred to the highest

court of the State reviewable by this court not as judgments of territorial courts, but on the contrary as judgments of state courts; in other words, making it plain that it was not contemplated that after a case had been transferred to and decided by a state court it would be subject to a review in this court, simply because it was pending in the territorial court at the time of the Enabling Act, as if it were a judgment of a territorial court.

Dismissed for want of jurisdiction.